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# Inquisitions by Officials:

## A Study of Due Process Requirements in Administrative Investigations—I

*The growing trend toward the enforcement of statutory and quasi-statutory law through administrative investigations raises serious questions involving the constitutional rights of persons subpoenaed to appear before government investigators. In this installment of his three-part Article, Mr. Rogge discusses the investigative practices and procedures of federal governmental agencies, focusing primarily on administrative subpoena powers and the right to counsel of subpoenaed persons. He concludes that to a certain extent our accusatorial method, represented by the grand jury, has been replaced by the inquisitorial system developed in continental Europe. In the subsequent installments, Mr. Rogge will examine the procedures of various state investigators and investigative bodies that have the benefit of subpoena powers and, on the basis of this study of both federal and state agencies, suggest certain necessary due process requirements.*

### O. John Rogge\*

In a 1924 decision, *FTC v. American Tobacco Co.*,<sup>1</sup> the United States Supreme Court refused to enforce a Federal Trade Commission order requiring a private corporation to produce its business records for inspection because the order failed to show probable cause. Mr. Justice Holmes, speaking for a unanimous Court, decisively stated:

anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies . . . to direct fishing expeditions into private papers.<sup>2</sup>

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1. 264 U.S. 298 (1924).

2. *Id.* at 305-06.

Yet recently, in *CAB v. Hermann*,<sup>3</sup> the Court reinstated a federal district court order enforcing a Civil Aeronautics Board subpoena duces tecum over the subpoenaed person's request for an adversary hearing to determine the relevancy of the subpoenaed material. The Court, per curiam, impliedly affirmed the broad relevancy criterion of the district court without even considering the constitutional rights of the persons subject to investigation as raised in *FTC v. American Tobacco Co.*

Other recent Supreme Court decisions indicate acceptance of the broad powers of investigation now exercised by governmental officials, both state and federal, but fail to determine the rights guaranteed to persons subpoenaed for investigative purposes. For example, in *In re Groban*<sup>4</sup> the Court upheld the constitutionality of an Ohio statute that failed to grant the right to counsel in an investigative hearing before a state fire marshal, reasoning that the subpoenaed person's right to counsel was no greater than before a grand jury. Also, in *Hannah v. Larche*,<sup>5</sup> the Court upheld the procedural rules of the Commission on Civil Rights against a claim that the rules violated the due process clause by denying witnesses a fair hearing, determining that the fact-finding, non-adjudicatory nature of the Commission's investigations permitted a relaxation of constitutional guarantees. Justices Black and Douglas, dissenting in both *Groban* and *Hannah v. Larche*, opposed the majorities' comparison of an administrative investigation to a grand jury proceeding, arguing that the danger of misuse of official power, inherent in secret investigations, is dispelled by the presence of responsible citizens on the grand jury and concluding that since criminal prosecutions might follow administrative investigations, due process requires that the parties be granted the right to counsel.

On January 3, 1963, in *Mead Corp.*,<sup>6</sup> the Federal Trade Commission entered an order giving persons subpoenaed to appear at nonpublic investigative hearings greater rights to counsel. The president of The Mead Corporation had been subpoenaed to appear before an attorney of the Commission in connection with a non-public "investigation being conducted to determine whether there is reason to believe that Section 7 of the Clayton Act, as amended, has been violated by The Mead Corporation."<sup>7</sup> The Mead Corporation moved for an order directing that its officers, who were sub-

3. 353 U.S. 322 (1957), reversing 237 F.2d 359 (9th Cir. 1956).

4. 352 U.S. 330 (1957).

5. 363 U.S. 420 (1960).

6. TRADE REG. REP. (1963 Trade Cas.) ¶ 16241 (FTC Jan. 3, 1963).

7. *Id.* at 21061.

poenaed in connection with the pending investigation, be given the right of "full representation" by counsel of their choice. According to the papers submitted in support of the motion, the Commission's attorney conducting the investigation informed The Mead Corporation's counsel that he would be permitted only to accompany the witness and to advise him privately, but would not be allowed to speak on the record. This limitation was dictated by Rule 1.40 of the Commission's Rules of Practice, which confines counsel for persons subpoenaed in a closed-door hearing to ear-whispering.<sup>8</sup>

The Commission's ruling was made by a three to two vote. According to the majority, the seven new rules, giving witnesses' lawyers a broader role in closed-door hearings, struck a reasonable balance "between two legitimate interests, that of administrative efficiency in conducting non-public pre-adjudicative investigations and that of proper representation by counsel of witnesses compelled to testify in such investigations."<sup>9</sup> The new rules, the majority believed, "will amply protect the legitimate interest of subpoenaed witnesses without impeding or impairing the efficiency of such investigations. We are convinced that these rules effectuate the policy of Congress, and will not contribute to any 'regulatory lag' or delay investigational hearings."<sup>10</sup>

Relying on the first sentence of section 6(a) of the Administrative Procedure Act of 1946,<sup>11</sup> which permits counsel for anyone compelled to appear in an administrative investigation to accompany, represent and advise his client, the majority concluded

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8. 27 Fed. Reg. 4610 (1962), amending 16 C.F.R. § 1.40 (1960). The FTC's new rules relating to the rights of subpoenaed witnesses in investigative proceedings are codified in 28 Fed. Reg. 7082 (1963).

9. Mead Corp., TRADE REG. REP. (1963 Trade Cas.) ¶ 16241, at 21063 (FTC Jan. 3, 1963).

10. *Id.* at 21064. The first three of the seven new rules provide:

1. A witness may have present with him counsel of his own choice.
2. Counsel for a witness may advise his client, in confidence, and upon the initiative of either himself or the witness, with respect to any question asked of his client, and if the witness refuses to answer a question, then counsel may briefly state on the record if he has advised his client not to answer the question and the legal grounds for such refusal.
3. Where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged (for reasons other than self-incrimination, as to which immunity from prosecution or penalty is provided by Section 9 of the Federal Trade Commission Act) to refuse to answer a question or to produce other evidence, counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the grounds therefor.

11. 60 Stat. 240, 5 U.S.C. § 1005(a) (1958).

that "the legislative history and unqualified language of Section 6(a) indicate that Congress intended it to apply to all administrative proceedings, including investigational hearings, where the appearance and testimony of witnesses is compelled."<sup>12</sup>

One dissenter believed, however, that the Commission should await the decision of the Court of Appeals for the Ninth Circuit in an appeal and cross appeal from *Federal Communications Comm'n v. Schreiber*.<sup>13</sup> In that case District Judge Leon R. Yankwich, pursuant to sections 409(f) and (g) of the Communications Act of 1934,<sup>14</sup> sustained the validity of a subpoena duces tecum that required the defendants to appear before a Federal Communication Commission hearing examiner in an investigation into television programming practices. But subsequently, in his conclusions of law, Judge Yankwich held section 6(a) of the Administrative Procedure Act applicable. The other dissenter in *Mead Corp.* argued that since Rule 1.40 complies with section 6(b) of the Administrative Procedure Act, which is the only section that specifically refers to nonpublic investigations, section 6(a) should not be applied to broaden the requirements of Rule 1.40. In support of this position, he relied on the Supreme Court's opinion in *Hannah v. Larche*, quoting the portions that deny the necessity of affording a witness full rights to counsel in a fact-finding, non-adjudicatory investigation.

The new standards adopted in *Mead Corp.* broaden the rules of permissible participation of counsel set forth in *Groban* and *Hannah v. Larche*. They also raise the broad question of the rights of persons subpoenaed to appear before an official or investigative body, other than a grand jury or a legislative committee,<sup>15</sup>

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12. *Mead Corp.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 16241, at 21062 (FTC Jan. 3, 1963); accord, 1 DAVIS, ADMINISTRATIVE LAW § 8.10, at 554-55 (1958): "The first sentence reverses the law declared in *Bowles v. Baer*, holding that witnesses subpoenaed in an administrative investigation may be denied representation by counsel. If the person is 'compelled to appear in person' he is entitled to counsel."

13. 201 F. Supp. 421 (S.D. Cal. 1962).

14. 48 Stat. 1096, 47 U.S.C. §§ 409(f), (g) (1958).

15. Legislative committees investigate primarily for legislative purposes. Moreover, a study of the rights of persons subpoenaed before such bodies would lead us into the problem of the separation of powers, which is beyond the scope of this Article. For Supreme Court cases involving subpoenaed witnesses before congressional committees who based their refusals to testify or to produce documents on other grounds than the fifth amendment privilege against self-incrimination, see *Deutch v. United States*, 367 U.S. 456 (1961); *Braden v. United States*, 365 U.S. 431 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *United States v. Rumely*, 345 U.S. 41 (1953); *United States v. Fleischman*, 339 U.S. 349 (1950); *United States v. Bryan*, 339 U.S. 323 (1950); *Sinclair v. United*

in a private investigative hearing. The purpose of this Article is to suggest certain due process requirements on the basis of a study of the practices and procedures of various federal and state investigators and investigative bodies that have the benefit of subpoena powers, trace the history of the grand jury, consider the modern inquisitional trend, and discuss both the modern English and French practices in the investigation of deviants.

## I. ADMINISTRATIVE PROCEDURE ACT

Prior to the enactment of the Administrative Procedure Act, a federal circuit court held in, *Bowles v. Baer*,<sup>16</sup> that a person could be compelled to appear before an official investigator and testify as well as produce documents without the benefit either of counsel or of a court reporter retained by him. Even before this decision, however, the Attorney General's Committee on Administrative Procedure had recommended a bill that provided: "Every person appearing or summoned in any administrative proceeding shall be allowed the assistance of counsel."<sup>17</sup>

In 1946 came section 6(a) of the Administrative Procedure Act. As initially introduced, the first two sentences of section 6(a) of this act read:

Any person compelled to appear in person before any agency or its representative is entitled to counsel. In other cases, every party may appear in person or by counsel . . .<sup>18</sup>

Congressman Francis E. Walter of Pennsylvania stated in the House Judiciary Committee's *Report* that this version of section 6(a)

is a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter, or process whether formal, informal, public, or private. The word "party" in the second sentence is to be understood as meaning any person showing the requisite interest in the matter, since the section applies in connection with

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States, 279 U.S. 263 (1929); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

16. 142 F.2d 787 (7th Cir. 1944). In *In re SEC*, 14 F. Supp. 417 (S.D.N.Y.), *aff'd*, 84 F.2d 316 (2d Cir.), *rev'd for mootness sub nom.* *Bracken v. SEC*, 299 U.S. 504 (1936), the court ordered a person to obey a subpoena of the SEC "without giving him a copy of his testimony or affording him the opportunity to bring his own stenographer." *In re SEC*, *supra* at 418-19. See also *Bilokumsky v. Tod*, 263 U.S. 149, 156 (1923); *Low Wah Suey v. Backus*, 225 U.S. 460, 470 (1912).

17. S. DOC. NO. 8, 77th Cong., 1st Sess. 193 (1941).

18. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 31 (1946), reprinted in Senate Comm. on the Judiciary, *Administrative Procedure Act—Legislative History*, S. DOC. NO. 248, 79th Cong., 2d Sess. 263 (1946).

the exercise of any agency authority whether or not formal proceedings are available.<sup>19</sup>

At the suggestion of the Senate Judiciary Committee, the prerogatives of the first sentence were explicitly spelled out to accord to any person compelled to appear before any agency the right to be "accompanied, represented, and advised by counsel."<sup>20</sup> Before making this suggestion, the Committee explained "the first sentence is a recognition that, in the administrative process, the benefit of counsel shall be accorded as of right just as recognized by the Bill of Rights in connection with the judicial process, and as proposed by the Attorney General's Committee . . . ."<sup>21</sup> The Committee was of the opinion that this change would facilitate the efficient conduct of investigations by permitting counsel to be present and to advise.

Thereafter the Administrative Procedure Act took its present form. In the House Judiciary Committee *Report* the act was interpreted as "an outline of minimum essential rights and procedures."<sup>22</sup> Congressman Walter commented that "the representation of counsel contemplated by the bill means full representation as the term is understood in the courts of law."<sup>23</sup> Finally, Senator McCarran, the spokesman for the Administrative Procedure Act in the Senate, stated that section 6(a) "provides that any person compelled to appear in person before any agency or its representative is entitled to counsel. In other cases every party may appear in person or by counsel."<sup>24</sup>

Thus, by applying section 6(a) to a nonpublic investigative hearing, the majority in *Mead Corp.* acted consistently with the above statements of congressional intent. Furthermore, the interpretation of section 6(a) by the Attorney General and the Hoover Commission support the FTC's holding. The *Attorney General's Manual on the Administrative Act* takes the view that section 6(a)

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19. H.R. REP. NO. 1980, *supra* note 18, at 31-32; S. DOC. NO. 248, *supra* note 18, at 263-64. Senator Pat McCarran of Nevada in the Senate Judiciary Committee's Report made substantially the same comment. S. REP. NO. 752, 79th Cong., 1st Sess. 19 (1945), reprinted in S. DOC. NO. 248, *supra* note 18, at 205.

20. S. DOC. NO. 248, *supra* note 18, at 26.

21. *Ibid.*

22. H. REP. NO. 1980, *supra* note 18, at 16, reprinted in S. DOC. NO. 248, *supra* note 18, at 250.

23. 92 CONG. REC. 5652 (1946), reprinted in S. DOC. NO. 248, *supra* note 18, at 362-63. This will vary, of course, depending on whether a person is a defendant in a criminal case, a party in civil litigation, or a witness in either.

24. 92 CONG. REC. 2156 (1946), reprinted in S. DOC. NO. 248, *supra* note 18, at 256.

restates existing law and practice that persons compelled to appear in person before an agency or its representative must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel.<sup>25</sup>

The Hoover Commission some years later reported that

In enacting section 6(a) . . . Congress intended that any person compelled to appear, or appearing voluntarily, before any agency or its officers and employees should be entitled to the benefit of counsel or other qualified representative.<sup>26</sup>

Nevertheless, administrative agencies have generally been slow to change their existing practices to conform to the requirements of section 6(a). For instance, the Internal Revenue Service in a 1945 *Manual of Instructions for Special Agents, Intelligence Unit*,<sup>27</sup> limited the participation of counsel of a subpoenaed person to advising him of his right to refuse to give answers that might incriminate him. According to the *Manual*, a third-party witness could be advised by his own counsel, but not by counsel for the taxpayer. Despite the enactment of the Administrative Procedure Act, the Internal Revenue Service continued its old practice, and in two reported cases, district courts sanctioned its refusal to permit a witness to be represented by counsel of his own choice because that counsel also represented the taxpayer who was under investigation.<sup>28</sup> In *Backer v. Commissioner*,<sup>29</sup> however, the Court of Appeals for the Fifth Circuit held that a subpoenaed witness was entitled to counsel of his own choice even though that counsel also

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25. *Attorney General's Manual on the Administrative Act* 61-62 (1947), quoted by the majority in *Mead Corp.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 16241, at 21062 n.2 (FTC Jan. 3, 1963).

26. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 287-88 (1955), quoted in part by the majority in *Mead Corp.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 16241, at 21062 n.2 (FTC Jan. 3, 1963). The Hoover Commission is incorrect in stating that section 6(a) applies to a person appearing voluntarily, but this does not detract from the force of its observations.

27. As quoted in *Backer v. Commissioner*, 275 F.2d 141, 143 (5th Cir. 1960).

28. *Torras v. Stradley*, 103 F. Supp. 737 (N.D. Ga. 1952); *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949). In *Torras v. Stradley*, *supra*, the court further held that the subpoenaed witness was not entitled to have his own stenographer present to take notes of his testimony. The Hoover Commission listed these two cases in its REPORT ON LEGAL SERVICES AND PROCEDURE, *op. cit. supra* note 26, at 287.

29. 275 F.2d 141 (5th Cir. 1960). In *United States v. Smith*, 87 F. Supp. 293, 294 (D. Conn. 1949), the court held § 6(a) of the Administrative Procedure Act applicable to nonpublic investigative hearings of the Internal Revenue Service: "We hold, therefore, that witnesses summoned to appear before Special Agents have the right to the presence and advice of counsel."



represented the taxpayer being investigated. The Securities and Exchange Commission, to consider another example, currently has double restrictions on the right to counsel that are comparable to those of the Internal Revenue Service. Under the SEC's Rule 3(c),<sup>30</sup> counsel for a subpoenaed witness may represent another witness or party only if the investigating officer or the Commission finds no conflict of interests or threat of disrupting the investigation.<sup>31</sup> Professor Loss states that counsel in an SEC investigation is limited to advising his client of his constitutional and common-law privileges and to objecting to questions that exceed the scope of the investigation.<sup>32</sup>

It appears that many agencies have disregarded section 6(a) of the Administrative Procedure Act and the due process clauses of the fifth and fourteenth amendments in limiting the rights of subpoenaed persons before investigative officials.

## II. FEDERAL ONE-MAN INVESTIGATORS

### 1. *Agriculture Department.*

The Departments of Agriculture and Labor and the SEC each has six separate statutory provisions under which one-man investigators function with subpoena powers. In the order of their enactment, the provisions applicable to the Department of Agriculture are: Packers and Stockyards Act,<sup>33</sup> The Grain Futures Act (Commodity Exchange Act),<sup>34</sup> Perishable Agricultural Commodities Act,<sup>35</sup> Agriculture Marketing Agreement Act,<sup>36</sup> Tobacco Inspection Act,<sup>37</sup> and Federal Seed Act.<sup>38</sup>

30.

It is clear that the right to counsel guaranteed under the Administrative Procedure Act is much broader than the right to have an attorney to advise him relative to his rights under the Fifth Amendment. The Act says such counsel may accompany, represent and advise the witness, without any limitation . . . . The term "right to counsel" has always been construed to mean counsel of one's own choice. . . . When Congress used the terms "right to be accompanied, represented, and advised by counsel," it must have used the language in the regularly accepted connotation . . . .

Backer v. Commissioner, 275 F.2d 141, 143-44 (5th Cir. 1960).

31. 17 C.F.R. § 201.3(3) (Supp. 1962).

32. 3 LOSS, SECURITIES REGULATION 1954-55 (2d ed. 1961).

33. 42 Stat. 168 (1921), 7 U.S.C. § 222 (1958).

34. 42 Stat. 1002 (1922), as amended, 7 U.S.C. § 15 (1958). An Act of June 15, 1936, changed the short title from "The Grain Futures Act" to "Commodity Exchange Act." 49 Stat. 1491, 7 U.S.C. § 1 (1958).

35. 46 Stat. 536 (1930), 7 U.S.C. § 499(m) (1958).

36. 48 Stat. 37 (1933), 7 U.S.C. § 610(h) (1958).

37. 49 Stat. 735 (1935), 7 U.S.C. § 511(n) (1958).

38. 53 Stat. 1289 (1939), 7 U.S.C. § 1603 (1958). The Packers and

Although each of the first four of these acts has an immunity provision similar to the one set forth in the Compulsory Testimony Act of 1893,<sup>39</sup> the remaining two acts have no immunity provisions. The 1893 act amended the Interstate Commerce Act's narrow immunity provisions,<sup>40</sup> which had been invalidated in *Counselman v. Hitchcock*.<sup>41</sup> This amendment was sustained three years later in *Brown v. Walker*,<sup>42</sup> which was the first Supreme Court decision to sustain a compulsory testimony provision. The act required a person subpoenaed under the Interstate Commerce Act to testify, but protected him from being "prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify. . . ."<sup>43</sup>

The Securities Act of 1933 refined the 1893-type provisions by requiring a subpoenaed person to claim his privilege against self-incrimination before being granted immunity;<sup>44</sup> nearly all subsequently enacted immunity provisions are of this type. The drafters of the Securities Act of 1933 proved to be farsighted on behalf of the government, for in *United States v. Monia*<sup>45</sup> the Supreme Court held that under the older form of immunity provision, a witness was immune even though he had not asserted his privilege against self-incrimination or his right of silence.

The Commodity Exchange Act and the Packers and Stockyards Act both empower the Secretary of Agriculture to investigate "in order to provide information for the use of Congress."<sup>46</sup> The Commodity Exchange Act empowers him to "make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade"<sup>47</sup> and, in addition, to "inves-

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Stockyards Act and the Agricultural Marketing Agreement Act refer to the enforcement procedures of the Federal Trade Commission Act, while the Grain Futures Act refers to the enforcement procedures of the Interstate Commerce Act. The Perishable Agriculture Commodities Act contains enforcement procedures similar to those referred to above.

39. 27 Stat. 443, 49 U.S.C. § 46 (1958).

40. 24 Stat. 382, 383 (1887), 49 U.S.C. § 9 (1958).

41. 142 U.S. 547 (1892).

42. 161 U.S. 591 (1896). In several recent cases the Court reaffirmed its holding in *Brown v. Walker*. See, e.g., *Piemonte v. United States*, 367 U.S. 556 (1961) (immunity provision in the Narcotic Control Act of 1956); *Reina v. United States*, 364 U.S. 507 (1960) (same); *Brown v. United States*, 359 U.S. 41 (1959) (Compulsory Testimony Act of 1893); *Ullmann v. United States*, 350 U.S. 422 (1956) (Immunity Act of 1954).

43. 27 Stat. 443 (1893), 49 U.S.C. § 46 (1958).

44. 48 Stat. 86 (1933), 15 U.S.C. § 77v(c) (1958).

45. 317 U.S. 424 (1943).

46. Commodity Exchange Act, 42 Stat. 1003 (1922), 7 U.S.C. § 12 (1958); Packers and Stockyards Act, 42 Stat. 168, 7 U.S.C. § 222 (1958).

47. 42 Stat. 1003 (1922), 7 U.S.C. § 12 (1958).

tigate marketing conditions of commodity and commodity products and byproducts, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges."<sup>48</sup> The remaining acts provide for various investigations as well as inspections of records and products.<sup>49</sup> The Federal Seed Act also requires the Secretary to give the accused appropriate notice and an opportunity to present "his views, either orally or in writing"<sup>50</sup> before he reports any violation of the act to the appropriate United States attorney. In the event of cease and desist proceedings under the act, the Secretary shall proceed by way of written complaint, notice, and a hearing at which "there shall be afforded the person a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses."<sup>51</sup>

Although there are provisions for counsel in formal proceedings,<sup>52</sup> the Secretary's many rules and regulations do not provide for counsel in investigations.<sup>53</sup> In proceedings under the Perishable Agricultural Commodities Act<sup>54</sup> and the Agricultural Marketing Agreement Act,<sup>55</sup> the presiding officer has a great amount of disciplinary control over counsel, and under the latter act, the presiding officer may exclude counsel from the proceedings if he is guilty of unethical or unprofessional conduct.

In an early case, the Secretary, acting under the Packers and

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48. *Ibid.*

49. Perishable Agricultural Commodities Act, 1930, 46 Stat. 536, 7 U.S.C. § 499m (1958); Agricultural Marketing Agreement Act, 48 Stat. 34 (1933), 7 U.S.C. § 608 (1958); Tobacco Inspection Act, 49 Stat. 732 (1935), 7 U.S.C. § 511b (1958); Federal Seed Act, 53 Stat. 1281 (1939), 7 U.S.C. § 1572 (1958).

50. 53 Stat. 1286 (1939), 7 U.S.C. § 1598 (1958).

51. 53 Stat. 1287 (1939), 7 U.S.C. § 1599(a) (1958).

52. 7 C.F.R. § 1.26(a)(1) (1959) (departmental proceedings), § 47.32(c)(1) (1959) (proceedings under the Perishable Agricultural Commodities Act, (1930), § 201.154(c)(1) (1959) (proceedings under the Federal Seed Act), § 900.60(b)(1) (1963) (proceedings under the Agriculture Marketing Agreement Act); 9 C.F.R. § 202.11(c)(1) (1959) (proceedings under the Packers and Stockyards Act, 1921). In departmental proceedings the rules provide: "In any proceedings before the Department, the parties may appear in person or by counsel or other representative. Persons who appear as counsel or in a representative capacity at a hearing must conform to the standards of ethical conduct required of practitioners before the courts of the United States." 7 C.F.R. § 1.26(a)(1) (1959).

53. See, e.g., 7 C.F.R. § 47.3 (1959) (proceedings under the Perishable Agricultural Commodities Act, 1930), § 201.151 (1959) (proceedings under the Federal Seed Act); 9 C.F.R. § 202.3 (1959) (Packers and Stockyards Act, 1921).

54. 7 C.F.R. § 47.32(c)(2) (1959).

55. 7 C.F.R. § 900.60(b)(2) (1963).

Stockyards Act, demanded access to the account books and records of certain packing companies before any complaint had been filed; the court held that this was unreasonable and violated the fourth amendment.<sup>56</sup> But two later cases had little difficulty in enforcing investigative subpoenas duces tecum under the same act.<sup>57</sup> In one of these, the court stated that if the agency, acting within its authority, made a definite demand for relevant information, the investigation could be made before a complaint was filed without violating the act.<sup>58</sup>

## 2. *Atomic Energy Commission.*

The Atomic Energy Commission is authorized to make such studies and investigations as it may deem necessary or proper to assist it in exercising any of its statutory functions.<sup>59</sup> The immunity provisions of the Compulsory Testimony Act of 1893 are applicable only to an individual who specifically asserts his privilege against self-incrimination. This is the refined type of compulsory testimony provisions that began with the Securities Act of 1933.

The AEC's regulations provide that hearings will be either formal or informal.<sup>60</sup> In formal hearings a party may be represented by counsel,<sup>61</sup> but there is no provision for counsel in informal hearings—the investigator follows procedures that best serve the purpose of the hearing, yet that are consistent with the Administrative Procedure Act.<sup>62</sup>

## 3. *Civil Aeronautics Board.*

The Civil Aeronautics Board has a rather complete statutory procedural blueprint.<sup>63</sup> Its one-man investigators are Board mem-

56. *Cudahy Packing Co. v. United States*, 15 F.2d 133 (7th Cir. 1926).

57. *United States v. Woerth*, 130 F. Supp. 930 (N.D. Iowa 1955), *aff'd*, 231 F.2d 822 (8th Cir. 1956); *United States v. C. & V. Poultry, Inc.*, 132 F. Supp. 945 (E.D.N.Y. 1955).

58. *United States v. Woerth*, 130 F. Supp. 940, 941 (N.D. Iowa 1955).

59. Atomic Energy Act of 1954, 68 Stat. 948, 42 U.S.C. § 2201(c) (1958).

60. Cf. 10 C.F.R. § 2.756 (1963).

61. 10 C.F.R. § 2.713 (1963).

62. 10 C.F.R. § 2.756 (1963).

63.

(a) Any member or examiner of the Board, when duly designated by the Board for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Board. In all cases heard by an examiner or a single member the Board shall hear or receive argument on request of either party.

(b) For the purposes of this Act the Board shall have the power to

bers or designated examiners who may conduct hearings anywhere in the United States. Its subpoenas, which may run anywhere in the United States, are enforced by federal court orders, and failure to obey such an order constitutes contempt of the court issuing it. Witness fees and mileage are the same as those paid federal court witnesses. When the Board's examiner inquires into deviant behavior, the Board has the benefit of the calculated form of the Compulsory Testimony Act that began with the Securities Act of 1933 and under which a subpoenaed person must claim his privilege against self-incrimination to obtain immunity.

The CAB, in its Rules of Practice in Aircraft Accident Investigation Hearings, has double restrictions on the right to counsel

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require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under investigation. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) The attendance of witnesses, and the production of books, papers, and documents, may be required from any place in the United States, at any designated place of hearing. In case of disobedience to a subpoena, the Board, or any party to a proceeding before the Board, may invoke the aid of any court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this section.

(d) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Board (and produce books, papers, or documents if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(i) No person shall be excused from attending and testifying, or from producing books, papers or documents before the Board, or in obedience to the subpoena of the Board, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

72 Stat. 792 (1958), 49 U.S.C. §§ 1484(a)-(d), (i) (1958). With reference to the provision in § 1484(a) that "the Board shall hear or receive argument on request of either party," the court held in *Sisto v. CAB*, 179 F.2d 47 (D.C. Cir. 1949) that "this does not bind them to do it in any particular manner." *Id.* at 54.

comparable to those of the Internal Revenue Service and the SEC. One of these rules, although inferentially admitting the applicability of section 6(a), nevertheless denies the right to make objections during the hearing.<sup>64</sup> Another rule empowers the hearing officer to designate parties to the investigation<sup>65</sup> and threatens a party with loss of status if he is represented by any person who also represents a claimant or insurer.<sup>66</sup>

*CAB v. Hermann*,<sup>67</sup> discussed above, illustrates how far the Supreme Court will now go in the enforcement of administrative subpoenas. The subpoenaed persons resisted the subpoenas on grounds of burdensomeness (compliance would have required search through more than a million documents), irrelevancy, and immunity of personal income tax returns. The appellate court reversed the district court's enforcement order, reasoning that to give rubber-stamp approval to the Board's subpoenas would create in that body the authority to judge the relevancy and materiality of each document subpoenaed.<sup>68</sup> The Supreme Court's per curiam reversal indicates its apparent approval of the rubber-stamp method and disregard for the constitutional questions involved.

#### 4. *Civilian Production Administration.*

During World War II the War Production Board, the Department of the Army, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation all had subpoena powers in the inspection of plants and the audit of books of defense contractors.<sup>69</sup> Immunity rights were similar to those contained in the Securities Act of 1933.<sup>70</sup> Moreover, the enforcement procedures for these subpoenas were of the drastic type available to the Internal Revenue Service and the Federal Trade Commission. These units of government could apply for a court order to enforce their subpoenas;<sup>71</sup> failure to comply with these subpoenas, even without a court order, was a misdemeanor that subjected the subpoenaed person "to a fine of not more than \$5,000, or to imprisonment for a term of not more than one year, or both."<sup>72</sup>

64. 14 C.F.R. § 303.2 (1963).

65. 14 C.F.R. § 303.16(a) (1963).

66. 14 C.F.R. § 303.16(b) (1963).

67. 353 U.S. 322 (1957), reversing per curiam 237 F.2d 359 (9th Cir. 1956); see Note, *Resisting Enforcement of Administrative Subpoenas Duces Tecum: Another Look at CAB v. Hermann*, 69 YALE L.J. 131 (1959).

68. *Hermann v. CAB*, 237 F.2d 359, 363 (1956).

69. Exec. Order No. 9127, 7 Fed. Reg. 2753 (1942).

70. Second War Powers Act of 1942, ch. 199, § 1302, 56 Stat. 185.

71. Second War Powers Act of 1942, ch. 199, § 1303, 56 Stat. 186.

72. *Ibid.*

In 1945 the War Production Board was terminated, and its functions were transferred to the Civilian Production Administration.<sup>73</sup> The next year this agency was consolidated, with other agencies, into the Office of Temporary Controls.<sup>74</sup> A year later the Office of Temporary Controls was terminated, and the functions of the Civilian Production Administration were transferred for liquidation to the Department of Commerce.<sup>75</sup>

##### 5. *Coast Guard.*

One of the earliest grants of subpoena power to an administrative official was an 1871 act relating to the officers and crews of vessels.<sup>76</sup> Local boards of inspectors were authorized to subpoena witnesses to appear in investigations of acts of incompetency or misconduct committed by a licensed officer while acting under the authority of his license—these subpoenas were enforced by federal court orders.

Today the Coast Guard is authorized to investigate marine casualties and accidents as well as all acts of misconduct or incompetency of any licensed officer or any holder of any certificate of service.<sup>77</sup> The authorizing statute grants to the party being investigated the right to be represented by counsel, to cross-examine witnesses, to state his defense, to appeal to the Commandant of the Coast Guard, and to be represented by counsel on that appeal.<sup>78</sup> There is, however, no immunity (compulsory testimony) provision.

Despite the statutory provisions for counsel, the regulations of the Commandant of the Coast Guard distinguish between investigations and hearings, making no provision for counsel in the form-

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73. Exec. Order No. 9638, 10 Fed. Reg. 12591 (1945).

74. Exec. Order No. 9809, 11 Fed. Reg. 14281 (1946).

75. Exec. Order No. 9841, 12 Fed. Reg. 2645 (1947). In *Cook v. United States*, 69 F. Supp. 445 (D. Ore. 1946), a subordinate agency employee of the Civilian Production Administration subpoenaed a building contractor to disclose the names of his customers and the nature of his contracts. The contractor asked the court to quash the subpoena. The judge did so, on the ground that the subpoena was indefinite as to time, and continued:

I might add: I do not understand that a minor government official can summon people at will to give testimony about their affairs and the affairs of their customers and neighbors. A United States Attorney cannot do that.

*Ibid.*

76. REV. STAT. § 4450 (1875), amended by 49 Stat. 1381 (1936), as amended, 46 U.S.C. § 239 (1958).

77. 49 Stat. 1381 (1936), as amended, 46 U.S.C. § 239(b) (1958).

78. *Ibid.*

er.<sup>79</sup> A party subject to investigation is only to be advised of the substance of the complaint and given an opportunity to refute it.<sup>80</sup>

Like the early boards of inspectors, the Coast Guard is authorized to enforce its subpoenas by a process similar to that granted to the United States District Courts.<sup>81</sup> One case assumed that this meant that the Coast Guard would apply to the court in the first instance to compel obedience.<sup>82</sup>

#### 6. Commerce Department.

The Export Control Act of 1949,<sup>83</sup> administered by the Secretary of Commerce,<sup>84</sup> limits the application of the immunity provisions of the Compulsory Testimony Act of 1893 to cases where the party specifically claims his privilege against self-incrimination.<sup>85</sup> Moreover, with the exception of section 3, which relates to the publication of information, the act specifically excludes the operation of the Administrative Procedure Act.<sup>86</sup>

The Secretary set up compliance procedures to be administered by compliance commissioners. An individual charged with non-compliance "may, if he so desires, be represented by counsel of his own choosing."<sup>87</sup> Compliance procedures are to be confidential except as to any resulting orders, but copies of transcripts of testimony are to be available to "parties to the proceedings and, to the extent of their own testimony as contained in transcripts, to witnesses."<sup>88</sup> A compliance commissioner may consider classified materials, but "in no case shall the respondent or his attorney be entitled to inspect the classified materials."<sup>89</sup>

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79. 46 C.F.R. §§ 131.09-.20 (1952).

80. 46 C.F.R. § 137.05-5(b) (1952).

81. 49 Stat. 1382 (1936), as amended, 46 U.S.C. § 239(e) (1958).

82. *In re Merchant Mariners Documents*, 91 F. Supp. 426 (N.D. Cal. 1949). There an examiner sought a court order requiring seamen to deliver to him their certificates of service pending final disposition of disciplinary charges against them. The court denied relief, but stated by way of dictum that

if the certificates were sought for use as evidence, the issuance of subpoenas requiring that they be presented would be within the authority of the Examiner and within the jurisdiction of this court to compel obedience.

*Id.* at 428

83. 63 Stat. 7, as amended, 50 U.S.C. App. §§ 2021-32 (1958) (Supp. 1962).

84. Exec. Order No. 10945, 26 Fed. Reg. 4487 (1961).

85. 63 Stat. 8, as amended, 50 U.S.C. App. § 2026(b) (1958) (Supp. 1958).

86. 63 Stat. 9, as amended, 50 U.S.C. App. § 2027 (1958) (Supp. 1958).

87. 15 C.F.R. § 382.3(a) (1963).

88. 15 C.F.R. § 382.14 (1963).

89. 15 C.F.R. § 382.7(c) (1963).



### 7. *Commodity Exchange Commission.*

The Commodity Exchange Act established the Commodity Exchange Commission, consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General. The Commission may suspend for a period not to exceed six months or revoke the designation of any board of trade as a "contract market."<sup>90</sup> Witnesses are subject to the enforcement procedures and immunity provision of the Interstate Commerce Act.<sup>91</sup> The applicable rules assign initial proceedings to a referee and, as to representation, have a provision like that of the Agriculture Department for departmental proceedings.<sup>92</sup>

### 8. *Federal Aviation Agency.*

The Administrator of the Federal Aviation Agency is empowered to "conduct such investigations . . . as he shall deem necessary" to fulfill his responsibilities.<sup>93</sup> His statutory enforcement procedures are the same as those of the CAB.<sup>94</sup> His regulations do not provide for counsel in investigations.<sup>95</sup>

### 9. *Federal Communications Commission.*

The Federal Communications Commission is authorized, with or without complaint, to investigate matters within its jurisdiction "in such manner and by such means as it shall deem proper."<sup>96</sup> On one occasion it was authorized to conduct a special investigation of the American Telephone and Telegraph Company and all other companies engaged in telephone communication in interstate commerce.<sup>97</sup>

The FCC's subpoenas are enforced by court orders,<sup>98</sup> and its compulsory testimony provision<sup>99</sup> is like that in the Securities Act of 1933. A person subpoenaed to appear in an FCC investigative proceeding has no right to counsel, and the rules permit the Commission to proceed in a manner that "will best serve the purposes of such proceeding."<sup>100</sup>

Since the FCC is of comparatively recent origin, it has had little

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90. 42 Stat. 1001 (1922), as amended, 7 U.S.C. § 8 (1958).

91. 42 Stat. 1002 (1922), as amended, 7 U.S.C. § 15 (1958).

92. 17 C.F.R. § 0.61(c)(1) (1949).

93. 72 Stat. 752 (1958), 49 U.S.C. § 1354(a) (1958).

94. 72 Stat. 753 (1958), 49 U.S.C. § 1354 (c) (1958).

95. 14 C.F.R. § 408.12 (1962).

96. 48 Stat. 1073, 1094 (1934), 47 U.S.C. §§ 208, 403 (1958).

97. S.J. Res. 46, 74th Cong., 1st Sess., 49 Stat. 43 (1935).

98. 48 Stat. 1096 (1934), 47 U.S.C. §§ 409(f), (g) (1958).

99. 48 Stat. 1097 (1934), 47 U.S.C. § 409(i) (1958).

100. 47 C.F.R. § 1.10 (1958).

difficulty in enforcing its subpoenas. The stress has been on questions relating to the rights of subpoenaed persons. In *FCC v. Cohn*,<sup>101</sup> a case arising out of investigations into television broadcasting, the court indicated that the FCC's subpoena powers extend to any individual who may possess documents relevant to the investigation even though that individual is not subject to the Commission's regulatory power.<sup>102</sup> In an earlier case, *Stahlman v. FCC*,<sup>103</sup> the Court of Appeals for the District of Columbia Circuit affirmed an order of enforcement of one of the Commission's subpoenas that required a prominent newspaper publisher, associated with an FM radio station, to appear at an investigation into high frequency broadcast stations. The court reasoned that the Commission had authority to obtain information relevant to an investigation "aimed at the prevention or disclosure of practices contrary to public interest."<sup>104</sup>

#### 10. Federal Home Loan Bank Board.

This "Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations.'"<sup>105</sup> The authorizing section contemplates only an adjudicative hearing conducted by a hearing examiner.<sup>106</sup> The Board or any of its members or representatives may issue subpoenas that are enforced by court orders. Most of the hearings are private, and although there is no immunity provision, a party may be represented by counsel.<sup>107</sup>

101. 154 F. Supp. 899 (S.D.N.Y. 1957). See also *FCC v. Schreiber*, 201 F. Supp. 421 (S.D. Cal. 1962).

102. *FCC v. Cohn*, 154 F. Supp. 899, 906 (1957).

103. 126 F.2d 124 (D.C. Cir. 1942), *affirming* 40 F. Supp. 338 (D.C. 1941).

104. *Id.* at 127-28. The amendment to the Interstate Commerce Act to which the court refers gave the ICC authority on its own motion to investigate any matter "concerning which any question may arise under any of the provisions of this act." 36 Stat. 551 (1910), 49 U.S.C. § 13(2) (1958). This amendment was passed to overcome the restrictive interpretation of *Harriman v. ICC*, 211 U.S. 407 (1908), and it succeeded. *Smith v. ICC*, 245 U.S. 33 (1917).

105. 48 Stat. 132 (1933), as amended, 12 U.S.C. § 1464(a) (1958).

106. 48 Stat. 132 (1933), as amended, 12 U.S.C. § 1464(d)(1) (1958).

107. 12 C.F.R. § 509.4 (1963). In a recent case, *Federal Home Loan Bank Bd. v. Long Beach Fed. Sav. & Loan Ass'n*, 295 F.2d 403 (9th Cir. 1961), the court held that the hearing examiner was not validly appointed because he was not selected by the Civil Service Commission, but rather was borrowed from the SEC although with approval of the Civil Service Commission.

### 11. *Federal Maritime Commission.*

The Federal Maritime Commission<sup>108</sup> has investigative and subpoena powers under the Shipping Act of 1916<sup>109</sup> and the Merchant Marine Act of 1936.<sup>110</sup> The latter act gives subpoena powers to the members of the Commission as well as to the Secretary of Commerce for the purpose of any investigation that, in the opinion of the Commission or the Secretary, is necessary and proper in carrying out the provisions of the act. The immunity provision of the 1916 act<sup>111</sup> is similar to the one set forth in the Compulsory Testimony Act of 1893, while the 1936 act<sup>112</sup> contains the refined type of immunity clause first enacted by the Securities Act of 1933.

The Commission's rules distinguish between investigative hearings and adjudicative proceedings.<sup>113</sup> In investigative hearings counsel are limited to ear-whispering although a witness is entitled either to receive a copy of his testimony (upon paying for it) or to inspect it.<sup>114</sup>

In a case involving an investigation of general increases of Alaskan rates and charges,<sup>115</sup> the Court of Appeals for the Ninth Circuit affirmed an enforcement order of a subpoena duces tecum although neither the Commission nor the district court had made a finding of relevance. But in two other cases<sup>116</sup> involving alien

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108. The Shipping Act of 1916 established the United States Shipping Board. Ch. 451, § 3, 39 Stat. 729. It was abolished in 1933, and its functions were transferred to the Department of Commerce. Exec. Order No. 6166, § 12, set out in a note to 5 U.S.C. § 132 (1958). The Merchant Marine Act, 1936, created the United States Maritime Commission, and vested in it the functions of the former United States Shipping Board. 49 Stat. 1985, 1987 (1936), 46 U.S.C. §§ 1111, 1114 (1958). Reorganization Plan No. 21 of 1950 created the Federal Maritime Board, and transferred to it the investigative functions of the United States Maritime Commission. 64 Stat. 1273 (1950). Reorganization Plan No. 7 of 1961 abolished the Federal Maritime Board and transferred its functions to the Federal Maritime Commission. 75 Stat. 840 (1961).

109. 39 Stat. 737, 46 U.S.C. § 826 (1958).

110. 49 Stat. 1991, 46 U.S.C. §§ 1124(a), (b) (1958); Reorganization Plan No. 7 of 1961, 75 Stat. 840 (1961).

111. 39 Stat. 737 (1916), 46 U.S.C. § 827 (1958). In two related cases the Court of Appeals for the District of Columbia Circuit held, following *United States v. Monia*, 317 U.S. 424 (1943), that subpoenaed grand jury witnesses obtained immunity under this section without specific claims of their privilege against self-incrimination. *United States v. Niarchos*, 125 F. Supp. 214 (D.D.C. 1954); *United States v. Onassis*, 125 F. Supp. 190 (D.D.C. 1954).

112. 49 Stat. 1991 (1936), 46 U.S.C. § 1124(c) (1958).

113. 46 C.F.R. § 201.295 (1962).

114. 46 C.F.R. § 201.300 (1962).

115. *Lee v. Federal Maritime Bd.*, 284 F.2d 577, 581 (9th Cir. 1960).

116. *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147 (D.

corporations engaged in the common carriage of cargo and passengers, the Court of Appeals for the District of Columbia Circuit vacated orders of the Commission for the production of information because the orders failed to state the purpose for which the information was demanded and, thus, "precluded a determination of relevancy."<sup>117</sup>

### 12. *Federal Petroleum Board.*

The Federal Petroleum Board administers the Connally Hot Oil Act,<sup>118</sup> and for this purpose, it has the same investigative powers as the SEC.<sup>119</sup> Although the Board in its earlier years and its predecessors, the Federal Tender Boards, made their investigative subpoenas returnable before them as bodies,<sup>120</sup> a 1962 amendment of the applicable regulations clearly indicates that the Board's chairman or any Interior Department employee whom he designates may exercise the Board's investigative powers.<sup>121</sup> In ordering the amendment, Secretary of the Interior Udall stated that the amendment was intended "to include in the regulations on the Connally Act a clear statement of the authority to conduct investigations under that act."<sup>122</sup> In several enforcement cases the Court of Appeals for the Fifth Circuit analogized the investigative powers of these boards to those of a grand jury.<sup>123</sup>

### 13. *Federal Power Commission.*

The Federal Power Commission has investigative and subpoena powers under the Federal Power Act<sup>124</sup> and the Natural Gas

C. Cir. 1961). *Hellenic Lines Ltd. v. Federal Maritime Bd.*, 295 F.2d 138 (D.C. Cir. 1961).

117. *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 155 (D.C. Cir. 1961).

118. 49 Stat. 30 (1935), as amended, 15 U.S.C. §§ 715-715I (1958). The President delegated his relevant powers under the act to the Secretary of the Interior, who in turn designated the Federal Petroleum Board to administer his regulations under his supervision. Exec. Order No. 10752, 23 Fed. Reg. 973 (1958); 30 C.F.R. § 222.2 (1959).

119. 49 Stat. 33 (1935), 15 U.S.C. § 715h (1958).

120. See, e.g., *Kilgore Nat'l Bank v. Federal Petroleum Bd.*, 209 F.2d 557 (5th Cir. 1954); *Zinser v. Federal Petroleum Bd.*, 148 F.2d 993 (5th Cir. 1945); *Genecov v. Federal Petroleum Bd.*, 146 F.2d 596 (5th Cir. 1944), *cert. denied*, 324 U.S. 865 (1945); *Graham v. Federal Tender Bd.*, 118 F.2d 8 (5th Cir. 1941).

121. 30 C.F.R. § 222.25 (1963).

122. 27 Fed. Reg. 11760 (1962).

123. *Kilgore Nat'l Bank v. Federal Petroleum Bd.*, 209 F.2d 557, 560 (5th Cir. 1954); *Genecov v. Federal Petroleum Bd.*, 146 F.2d 596 (5th Cir. 1944), *cert. denied*, 324 U.S. 865 (1945); *The President v. Skeen*, 118 F.2d 58 (5th Cir. 1941).

124. 49 Stat. 856 (1935), 16 U.S.C. § 825f (1958).

Act,<sup>125</sup> both of which contain compulsory testimony provisions of the same type as in the Securities Act of 1933. The FPC's subpoenas are enforced by court orders,<sup>126</sup> and the willful failure to obey a subpoena constitutes a misdemeanor with a corresponding fine of not more than 1,000 dollars or imprisonment for not more than one year, or both.<sup>127</sup> In *FPC v. Metropolitan Edison Co.*,<sup>128</sup> the Supreme Court stated that respondent's good faith refusal to obey an FPC subpoena did not constitute a "willful" violation of the Federal Power Act because the FPC had not applied to a federal court for enforcement.

The FPC goes beyond the requirements of section 6(a) of the Administrative Procedure Act and makes provision for full representation by counsel for voluntary as well as subpoenaed witnesses.

(2) Any person compelled to appear or voluntarily testifying or making a statement before the Commission or the presiding officer, may be accompanied, represented and advised by an attorney or other qualified representative.

(3) All persons appearing before the Commission or the presiding officer must conform to the standards of ethical conduct required of practitioners before the Courts of the United States . . .<sup>129</sup>

#### 14. Federal Trade Commission.

As a result of recent expressions of opposition to the limited role of counsel in nonpublic investigative hearings, the Federal Trade Commission adopted the rules set forth in *Mead Corp.*<sup>130</sup> In *Wanderer v. Kaplan*<sup>131</sup> a federal district court held that section 6(a) of the Administrative Procedure Act applied to investigative as well as adjudicative proceedings before the FTC. In another case, the FTC, departing from its usual practice of conducting in-

125. 52 Stat. 828 (1938), 15 U.S.C. § 717m (1958).

126. For such a case under the Natural Gas Act, see *People Natural Gas Co. v. FPC*, 127 F.2d 153 (D.C. Cir.), cert. denied, 316 U.S. 700 (1942).

127. Federal Power Act, 49 Stat. 856 (1935), 16 U.S.C. § 825f(c) (1958); Natural Gas Act, 52 Stat. 828 (1938), 15 U.S.C. § 717m(d) (1958).

128. 304 U.S. 375 (1938). Chief Justice Hughes characterized the FPC's order in that case as "nothing more than a notice," and commented that the Commission had no authority "to enforce its directions to appear, testify or produce books and papers save by application to a federal court. . . ." *Id.* at 386. For a similar dictum, see *Mississippi Power & Light Co. v. FPC*, 131 F.2d 148 (5th Cir. 1942).

129. 18 C.F.R. § 1.4(a) (1961).

130. TRADE REG. REP. (1963 Trade Cas.) ¶ 16241 (FTC Jan. 3, 1963, discussed in text accompanying notes 6-15 *supra*). See 28 Fed. Reg. 7082 (1963).

131. TRADE REG. REP. (1962 Trade Cas.) ¶ 70535 (D.D.C. Oct. 30, 1962).

vestigative hearings in private, ordered a public investigation of milk pricing in Indiana and subpoenaed officials of the Kroger Company as well as other food chains.<sup>132</sup> The Kroger Company then obtained a temporary restraining order and the FTC withdrew the subpoenas directed to the Kroger officials. In yet other cases there were complaints that the FTC's rule limiting counsel to ear-whispering was unfair.<sup>133</sup>

The FTC is one of the agencies, along with the Interstate Commerce Commission that has been in existence long enough to have witnessed a reversal in the Supreme Court's attitude toward its investigational subpoenas and orders. In *FTC v. American To-*

132. *Hall v. Lemke*, TRADE REG. REP. (1962 Trade Cas.) ¶ 70338 (N.D. Ill. May 7, 1962).

133. *Warehouse Distribs., Inc.*, BNA Antitrust & Trade Reg. Rep. No. 48, at A-9, June 12, 1962 (nonpublic investigation in which counsel was not permitted to object to questions or answers, to make statements on the record, or to examine his client); *St. Regis Paper Co.*, BNA Antitrust & Trade Reg. Rep. No. 25, at A-9, Jan. 2, 1962 (counsel limited to advising client).

The Administrative Conference of the United States has adopted an interpretation of § 6(a) of the Administrative Procedure Act that appears to be consistent with the standards set forth in *Mead Corp.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 16241 (FTC Jan. 3, 1963).

a. The right to be "accompanied" by counsel means the right of any person compelled to appear before any agency or agency representative to have counsel present with him during any proceeding or investigation.

b. The right to be "advised" by counsel means that any person compelled to appear in person shall be entitled to the advice in confidence of counsel before, during, and after the conclusion of any agency proceeding or investigation for which his presence is compelled.

c. The right to be "represented" by counsel means as a minimum that counsel for any person compelled to appear in person shall be permitted to make objections on the record and to argue briefly the basis for such objections in connection with any agency examination of his client.

d. In addition, each agency is urged to re-examine its rules and practice and to effect appropriate changes therein to the extent that it determines that it can properly permit persons compelled to appear in person in any agency proceeding or investigation to be examined further for the record by their own counsel following other questioning. It Is Recommended that:

2. The right to counsel be interpreted with a view to preserving the highest concept of administrative fairness and as generously as reasonable administrative efficiency permits. Agencies should recognize that the right to counsel, including, to the extent appropriate, opportunity for cross-examination and production of limited rebuttal testimony or documentary evidence, is particularly important to any person involved in a public investigation where implications of wrongdoing by that person are made a part of the public record.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORT OF THE FOURTH PLENARY SESSION 4-5 (June 29, 1962).

*bacco Co.*<sup>134</sup> the Court refused to support FTC orders for the production of documents because it thought the requests involved "fishing expeditions."<sup>135</sup> But in *United States v. Morton Salt Co.*<sup>136</sup> the Court sustained an order of the FTC even though it involved "a mere 'fishing expedition.'"<sup>137</sup> The order required the respondent corporations to file reports showing how they had complied with a court decree enforcing one of the FTC's cease and desist orders. After comparing administrative investigations to grand jury proceedings, the Court stated that the order would be upheld even if based upon nothing more than "official curiosity."<sup>138</sup>

Since *Morton Salt*, the courts have enforced a variety of the Commission's subpoenas and orders under varying circumstances. In *FTC v. Crafts*<sup>139</sup> the Court, in a per curiam reversal, required the enforcement of a subpoena duces tecum for a quantity of records of an insurance company; the FTC was investigating the company's advertising practices. In *FTC v. Harrell*<sup>140</sup> the Court of Appeals for the Seventh Circuit held that section 9 of the Federal Trade Commission Act<sup>141</sup> authorizes the FTC to subpoena the records of individuals as well as those of corporations. In two more cases the courts enforced subpoenas duces tecum calling for documentary evidence from persons neither being investigated nor proceeded against<sup>142</sup>—there have been many comparable rulings.<sup>143</sup>

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134. 264 U.S. 298 (1924), discussed in text accompanying notes 1-3 *supra*.

135. *Id.* at 306.

136. 338 U.S. 632 (1950).

137. *Id.* at 641.

138. *Id.* at 652.

139. 355 U.S. 9 (1957), reversing 244 F.2d 882 (9th Cir. 1957); see *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), affirming 285 F.2d 607 (2d Cir.), affirming in part and reversing in part 181 F. Supp. 862 (S.D.N.Y. 1960). *Contra*, *FTC v. Dilger*, 276 F.2d 739 (7th Cir.), cert. denied, 364 U.S. 882 (1960).

140. 313 F.2d 854 (7th Cir. 1963), reversing 205 F. Supp. 17 (E.D. Ill. 1962).

141. 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958). This section provides that the FTC "shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

142. *FTC v. Bowman*, 248 F.2d 456 (7th Cir. 1957); *FTC v. Tuttle*, 244 F.2d 605 (2d Cir.), cert. denied, 354 U.S. 925 (1957).

143. See, e.g., *FTC v. Standard Am., Inc.*, 306 F.2d 231 (3d Cir. 1962); *Adams v. FTC*, 296 F.2d 861 (8th Cir. 1961), cert. denied, 369 U.S. 864 (1962). ("As pointed out in *Federal Communications Commission v. Cohn* . . . broadness alone is not sufficient justification to refuse en-

The FTC's enforcement procedures are as severe as those of the FPC and the Internal Revenue Service. Although under section 9 of the Federal Trade Commission Act, the FTC may apply to the federal courts for enforcement orders of its subpoenas,<sup>144</sup> which is the usual procedure for the enforcement of the subpoenas of administrative agencies, section 10 contains additional, and more stringent, remedies.<sup>145</sup> A person who fails to obey one of the Commission's subpoenas "shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment."<sup>146</sup> A person who denies the Commission access to records requested for the purpose of inspection is subject to the same fines, but may be imprisoned for up to three years.<sup>147</sup> If a corporation fails to file a requested report within the time specified, "and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure."<sup>148</sup>

Moreover, in *St. Regis Paper Co. v. United States*,<sup>149</sup> the Court not only sustained the validity of a Commission order for the production of copies of schedules submitted to the Census Bureau, but also held the corporate defendant liable for the fine of 100 dollars a day even before the time of any court enforcement order and despite the fact that the district court had found the Commission's orders "partially defective."<sup>150</sup> Apparently, the language in *FPC v. Metropolitan Edison Co.*<sup>151</sup> excusing good faith dis-

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forcement of a subpoena so long as the material sought is relevant." *Id.* at 867); *Hunt Food & Indus., Inc. v. FTC*, 286 F.2d 803 (9th Cir. 1960), *cert. denied*, 365 U.S. 877 (1961) ("The Commission has issued a great many pre-complaint subpoenas in the past forty-five years, and many of them have been judicially upheld." *Id.* at 809); *FTC v. Hallmark, Inc.*, 265 F.2d 433 (7th Cir. 1959); *FTC v. Scientific Living, Inc.*, 254 F.2d 598 (3d Cir.), *affirming* 150 F. Supp. 495 (M.D. Pa. 1957), *cert. denied*, 358 U.S. 867 (1958); *FTC v. Rubin*, 245 F.2d 60 (2d Cir. 1957); *FTC v. Reed*, 243 F.2d 308 (7th Cir.), *cert. denied*, 355 U.S. 823 (1957); *Menzies v. FTC*, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957); *FTC v. Waltham Watch Co.*, 169 F. Supp. 614 (S.D.N.Y. 1959).

144. 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958).

145. 38 Stat. 723 (1914), as amended, 15 U.S.C. § 50 (1958).

146. *Ibid.*

147. *Ibid.*

148. *Ibid.*

149. 368 U.S. 208 (1961), *affirming* 285 F.2d 607 (2d Cir.), *affirming in part and reversing in part* 181 F. Supp. 862 (S.D.N.Y. 1960).

150. *Id.* at 223.

151. 304 U.S. 375, 386, 387 (1938).



obedience of an FPC order prior to court enforcement has little, if any, meaning today.

15. *Immigration and Naturalization Service.*

Section 235(a) of the Immigration and Nationality Act of 1952,<sup>152</sup> which contains no immunity provision,<sup>153</sup> grants broad subpoena powers to the Attorney General and all immigration officers; subpoenas may be enforced by court orders. In *United States v. Minker*<sup>154</sup> the Court held that the word "witnesses" in section 235(a) does not extend to citizens who were themselves the subject of denaturalization investigations.<sup>155</sup> In one later instance, however, the Court denied certiorari in a case where the Court of Appeals for the First Circuit held that the word "witnesses" did extend to an alien who was the subject of an investigative proceeding constituting the initial step in possible deportation proceedings against the alien.<sup>156</sup> The Court also denied certiorari on an appeal from a decision that limited the *Minker* holding to its precise facts and decided that the word "witnesses" did extend to naturalized citizens even though they contended that they might themselves be under investigation by the Service.<sup>157</sup>

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152. 66 Stat. 198, 8 U.S.C. § 1225(a) (1958). The Attorney General is charged with the administration and enforcement of this act. 66 Stat. 173 (1952), 8 U.S.C. § 1103(a) (1958). He is authorized to delegate his powers to the Commissioner of Immigration and Naturalization. 66 Stat. 174 (1952), as amended, 8 U.S.C. § 1103(b) (1958). There is a further investigative subpoena provision in 66 Stat. 255 (1952), 8 U.S.C. § 1446(b) (1958) in connection with the direction to the Attorney General to "designate employees of the Service to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make recommendations thereon to such court."

153. Claims of the privilege against self-incrimination were sustained in *Graham v. United States*, 99 F.2d 746 (9th Cir. 1938); *Shaughnessy v. Bacolas*, 135 F. Supp. 15 (S.D.N.Y. 1955) (dictum). *But cf.* *Loufakis v. United States*, 81 F.2d 966, 967 (3d Cir. 1936); *United States v. Lee Hee*, 60 F.2d 924, 925 (2d Cir. 1932). In *Brown v. United States*, 356 U.S. 148 (1958) a denaturalization case, the Court held that the petitioner, a naturalized citizen, by taking the stand as a witness in her own behalf had waived her privilege against self-incrimination and was subject to a criminal contempt sentence for refusing, on fifth amendment grounds, to answer certain questions on cross-examination.

154. 350 U.S. 179 (1956).

155. *Id.* at 190. In *Lee Tin Mew v. Jones*, 268 F.2d 376 (9th Cir. 1959), the court answered in the negative "the question whether the statute was intended to require a person resident in the country to give evidence as to his citizenship." *Id.* at 379. Circuit Judge Walter L. Pope felt that "the rationale which led to the decision in *Minker* is equally controlling here." *Id.* at 380.

156. *Sherman v. Hamilton*, 295 F.2d 516, 517 (1st Cir. 1961), *cert. denied*, 369 U.S. 820 (1962).

157. *United States v. Zuskar*, 237 F.2d 528 (7th Cir. 1956), *cert. denied*

Section 5(c) of the Administrative Procedure Act forbids the commingling of prosecuting and adjudicating functions.<sup>158</sup> In *Wong Yang Sung v. McGrath*<sup>159</sup> the Supreme Court held that deportation proceedings had to conform to the requirements of section 5(c), reasoning that the guarantee of a fair and unbiased proceeding justifies the added inconvenience and expense to the Immigration Service.<sup>160</sup> Congress subsequently altered the effect of this holding. The Supplemental Appropriation Act of 1950,<sup>161</sup> provided that proceedings directed toward the exclusion or expulsion of aliens were not to be governed by sections 5, 7, and 8 of the Administrative Procedure Act. Section 242(b) of the Immigration and Nationality Act of 1952<sup>162</sup> established a procedure that permitted a special inquiry officer to take the dual role of prosecutor and judge, presenting evidence, interrogating witnesses, and making a determination as to deportability.

In *Marcello v. Bonds*<sup>163</sup> the Supreme Court held that section 242(b) supersedes the hearing provisions of section 5(c) of the Administrative Procedure Act. The Court concluded that the contention that this procedure violates due process was "without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters."<sup>164</sup>

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*sub nom.* Budzileni v. United States, 352 U.S. 1004 (1957). For other instances where the courts enforced, in whole or in part, investigative subpoenas in immigration cases see *United States v. Vivian*, 224 F.2d 53 (7th Cir. 1955); *cert. denied*, 350 U.S. 953 (1956); *United States v. Vivian*, 217 F.2d 882 (7th Cir. 1955); *Graham v. United States*, 99 F.2d 746 (9th Cir. 1938); *Loufakis v. United States*, 81 F.2d 966 (3d Cir. 1936); *In re Estes*, 86 F. Supp. 769 (N.D. Tex. 1949).

158. 60 Stat. 240 (1946), 5 U.S.C. § 1004(c) (1958).

159. 339 U.S. 33 (1950).

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Nor can we accord any weight to the argument that to apply the Act to such hearings will cause inconvenience and added expense to the Immigration Service. Of course it will, as it will to nearly every agency to which it is applied. But the power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not too high . . . .

339 U.S. at 46-47.

161. Act of Sept. 27, 1950, ch. 1052, 64 Stat. 1048.

162. 66 Stat. 208 (1952), 8 U.S.C. § 1252(b) (1958).

163. 349 U.S. 302 (1955).

164. *Id.* at 311; *accord*, *United States ex rel. Catalano v. Shaughnessy*, 197 F.2d 65, 67 (2d Cir. 1952): "The combination of hearing and investigating functions in one person in deportation proceedings is not a denial of due process."

This commingling of prosecuting and adjudicating functions in a special inquiry officer is reminiscent of the role of the French *Juge d'Instruction*, whose powers will be considered in the next installment of this Article. Of course, one must bear in mind that our governmental officials treat aliens, and even naturalized citizens, with somewhat less regard than they do those of us who are born here.<sup>165</sup>

#### 16. *Internal Revenue Service.*

The agency that has the oldest investigative subpoena powers, the most varied as well as the most severe enforcement procedures, and probably has issued the greatest number of such subpoenas is the Internal Revenue Service. An 1864 act gave assessors power to summon persons before them and, upon failure to comply with the summons, to apply to a district judge for an "attachment . . . as for a contempt"<sup>166</sup> against that person. The judge was empowered to order compliance with the summons and to punish the offender for his disobedience. An 1866 act had a comparable provision, but re-

165. See, e.g., *Flemming v. Nestor*, 363 U.S. 603 (1960) (sustaining the validity of a statutory provision that deprives an alien of his old-age insurance benefits upon his deportation for past Communist party membership); *Niukkanen v. McAlexander*, 362 U.S. 390 (1960) (affirming a federal district court decision that an alien was deportable for membership in the Communist party, based on the court's disbelief of an alien's court testimony); *Rogers v. Quan*, 357 U.S. 193 (1958) (holding six aliens physically present in this country deportable to Communist China); *Leng May Ma*, 357 U.S. 185 (1958) (same); *Jay v. Boyd*, 351 U.S. 345 (1956) (sanctioning the use of secret informers in suspension of deportation proceedings); *Galvan v. Press*, 347 U.S. 522 (1954) (sustaining the constitutionality of a section of the Internal Security Act of 1950 which provided for the deportation of any alien who had been a member of the Communist party at any time after entry); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (deciding, that the Attorney General could force a law-abiding citizen to remain on Ellis Island without a hearing); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (sustaining the constitutionality of the Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (1940), Title I of which is better known as the Smith Act, 64 Stat. 808 (1948), as amended, 18 U.S.C. 2385 (1958), and holding that the United States could deport legally resident aliens because of former membership in the Communist party); *Carlson v. Landon*, 342 U.S. 524 (1952) (sustaining the claim of the Attorney General, in a case involving five resident aliens, that under the Internal Security Act of 1950 he had the power to deny them bail on the basis of secret charges by secret informers and without affording them a hearing); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (supporting the Attorney General, in the case of an alien war bride, in his double claim that he had power not only to exclude her without a hearing but also that he did not have to reveal to anyone the material that was the basis for his decision); *Ludecke v. Watkins*, 335 U.S. 160 (1948) (holding judicially unreviewable the Attorney General's banishment of an alien without a hearing on the basis of secret undisclosed information).

166. Act of June 30, 1864, ch. 173, § 14, 13 Stat. 226-27.

quired the judge's orders to be consistent "with the provisions of existing laws for the punishment of contempts."<sup>167</sup> These provisions became section 3175 of the Revised Statutes of 1875, later section 3615(e) of the Internal Revenue Code of 1939,<sup>168</sup> and are now section 7604(b) of the Internal Revenue Code of 1954.<sup>169</sup>

The Internal Revenue Service also has available to it the usual methods of court enforcement of administrative subpoenas. Section 7402(b) provides with reference to any subpoenaed person that "the district court of the United States for the district in which such person resides or shall be found shall have jurisdiction by appropriate process to compel"<sup>170</sup> obedience. In addition, section 7210 imposes a fine of not more than 1,000 dollars or imprisonment up to one year for disobedience of a subpoena.<sup>171</sup> But, as in the case of the Immigration and Naturalization Service, there is no immunity provision.<sup>172</sup>

The "attachment . . . as for a contempt" language in section 7604(b) has raised two questions not ordinarily encountered in the enforcement of administrative subpoenas: does disobedience of the subpoena prior to a court enforcement order constitute con-

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167. Act of July 13, 1866, ch. 184, § 9, 14 Stat. 101.

168. Int. Rev. Code of 1939, § 3615(e), 53 Stat. 439 (1939).

169. INT. REV. CODE OF 1954, § 7604(b).

170. INT. REV. CODE OF 1954, § 7402(b).

171. INT. REV. CODE OF 1954, § 7210.

172. Claims of the privilege against self-incrimination have been sustained in a number of cases. See, e.g., *Warnell v. United States*, 291 F.2d 687 (5th Cir. 1961); *Application of Howard*, 210 F. Supp. 301 (W.D. Pa. 1962); *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956); *Application of Daniels*, 140 F. Supp. 322 (S.D.N.Y. 1956); *In re Friedman*, 104 F. Supp. 419 (S.D.N.Y. 1952).

Of course, the general inroads that have been made on the privilege have also been applied here. In *Application of Howard*, *supra*, and *United States v. Willis*, 145 F. Supp. 365 (M.D. Ga. 1955), the courts applied the required records exception announced by the Court in *Shapiro v. United States*, 335 U.S. 1 (1948). In *Glotzbach v. Klavans*, 196 F. Supp. 685 (E.D. Va. 1961), the court held that the taxpayer had waived the privilege, a result sanctioned by the Court in *Brown v. United States*, 356 U.S. 148 (1958) and *Rogers v. United States*, 340 U.S. 367 (1951). In *United States v. Silverstein*, 314 F.2d 789 (2d Cir. 1963), *affirming* 210 F. Supp. 401 (S.D.N.Y. 1962), the court, following *McPhaul v. United States*, 364 U.S. 372 (1960), and *United States v. White*, 322 U.S. 694 (1944), excluded certain documents from the privilege because they were held in a representative capacity; *accord*, *United States v. Boccuto*, 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959).

An early case, *In re Phillips*, 19 Fed. Cas. 506 (No. 11097) (D.C. Va. 1869), applied the compulsory testimony provision in an Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37, which became Rev. Stat. § 860 (1875). But the Supreme Court later held, in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), that the immunity provision was not broad enough to be effective; and Congress, a number of years thereafter, repealed the section. Act of May 7, 1910, ch. 216, 36 Stat. 352.

tempt? and is the court enforcement order interlocutory and therefore not appealable? Usually disobedience of an administrative subpoena is not a contempt—the contempt lies in the failure to obey a court enforcement order, and is for disrespect of the court. But under section 7604(b) the courts have indicated that they will go both ways. In *Application of Colton*<sup>173</sup> Circuit Judge Friendly for the Second Circuit indicated the possibility that under this section “the judge or the commissioner might, if he so chose, punish for contempt without giving the witness an opportunity to answer.”<sup>174</sup> But in *Brody v. United States*<sup>175</sup> Chief Judge Calvert Magruder for the First Circuit stated that

the proceeding was not strictly one of contempt, but was more accurately a proceeding to obtain the assistance of the court in forcing Brody to give the desired information to the Internal Revenue Service by the device of having the court issue an order to that effect, disobedience of which would be contempt punishable by the court.<sup>176</sup>

On the question of appealability, until section 7604(b) the courts held that court enforcement orders of administrative subpoenas are final and appealable;<sup>177</sup> court orders enforcing court

173. 291 F.2d 487 (2d Cir. 1961). Subsequently the court affirmed the district court's enforcement orders. *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

174. *Application of Colton*, 291 F.2d 487, 489 (2d Cir. 1961).

175. 243 F.2d 378 (1st Cir.), *cert. denied*, 354 U.S. 923 (1957).

176. *Id.* at 381; *accord*, *Reisman v. Caplin*, 317 F.2d 123, 126 (D.C. Cir. 1963) (dictum): “We take it that such a hearing would be a necessary preliminary to citing a summoned party for contempt for failure to comply with a summons, and that a contempt order could not be summarily imposed.”

In an early case, *In re Kinney*, 102 Fed. 468 (D.R.I. 1900), the court, quoting the dictum in *ICC v. Brimson*, 154 U.S. 447, 489 (1894), in turn expressed the dictum that if REV. STAT. § 3175 (1875) “does in fact authorize a judge or commissioner to arrest and punish for a contempt of the order of the collector of internal revenue it is unconstitutional and void.” *In re Kinney*, *supra* at 468.

Several courts have held that disobedience of a court enforcement order constitutes a civil contempt. See, e.g., *McCrone v. United States*, 307 U.S. 61 (1939); *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1956); *Sauber v. Whetstone*, 199 F.2d 520 (7th Cir. 1952), *cert. denied*, 344 U.S. 928 (1953); *In re Fahey*, 192 F. Supp. 492 (W.D. Ky.), *aff'd*, 300 F.2d 383 (6th Cir. 1961); *Hinchcliff v. Clarke*, 205 F. Supp. 1 (N.D. Ohio 1961).

177. *Ellis v. ICC*, 237 U.S. 434 (1915); *Harriman v. ICC*, 211 U.S. 407 (1908); *ICC v. Brimson*, 154 U.S. 447 (1894); *United States v. Vivian*, 224 F.2d 53 (7th Cir. 1955), *cert. denied*, 350 U.S. 953 (1956); *United States v. Vivian*, 217 F.2d 882 (7th Cir. 1955); *Penfield v. SEC*, 143 F.2d 746 (9th Cir. 1944). There is, however, a body of suggestion that administrative agencies should themselves have contempt power. See, e.g., Alberts-worth, *Administrative Contempt Powers, A Problem in Technique*, 25 A.B.A.J. 954 (1939); Parker, *Contempt Procedure in the Enforcement of Administrative Orders*, 40 ILL. L. REV. 344 (1946); Sherwood, *The Enforcement of Administrative Subpoenas*, 44 COLUM. L. REV. 531 (1944);

subpoenas, however, are not final and appealable.<sup>178</sup>

On the appealability of court enforcement orders under section 7604(b), the courts divided. The Court of Appeals for the Seventh Circuit has concluded that they are interlocutory and not appealable,<sup>179</sup> while the Courts of Appeals for the First, Second, Fifth, and Eighth Circuits have reached a contrary result.<sup>180</sup> The question came before the Supreme Court in *Davis v. Soja*,<sup>181</sup> but the case was not disposed of on the merits because of a joint suggestion of mootness.

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Note, *Use of Contempt Power to Enforce Subpoenas and Orders of Administrative Agencies*, 71 HARV. L. REV. 1541 (1958). Professor Sherwood stated his case this way: "It will be argued that administrative agencies will abuse such authority. So they will; and so have the courts. Yet the abuse of public and private rights which results from administrative action too long postponed is just as serious as the occasional excess of authority which is a part of all human institutions." Sherwood, *supra* at 547.

In contrast, Justice Murphy in his dissenting opinion in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 218-19 (1946), argued that administrative agencies should have neither subpoena nor contempt power. In answer to this argument, Professor Davis had stated:

One obvious difficulty with this view is that even if the subpoena power is confined exclusively to the judiciary, the result is that subpoenas are issued not by judges but by clerks of court and by the assistants who work in clerks' offices. For instance, the Federal Rules of Civil Procedure provide that clerks "shall" issue on the request of a party both subpoenas for witnesses and subpoenas for records, "signed and sealed but otherwise in blank." The traditional system of the regular courts is thus to entrust the issuance of subpoenas, that is, the determination of whether and when and to whom they shall be issued, to any lawyer who asks for the blanks.

1 DAVIS, ADMINISTRATIVE LAW 223 (1958). In *United States v. Zuskar*, 237 F.2d 528, 532-33 n.3 (7th Cir. 1956), *cert. denied sub nom.* Budzileni v. United States, 352 U.S. 1004 (1957), the court quoted a substantially similar statement contained in DAVIS, ADMINISTRATIVE LAW 130 (1951).

178. *Cobbledick v. United States*, 309 U.S. 323 (1940); *Alexander v. United States*, 201 U.S. 117 (1906).

179. Application of *Davis*, 303 F.2d 601 (7th Cir. 1962), *cert. granted sub nom.* *Davis v. Soja*, 371 U.S. 810 (1962); *Jarecki v. Whetstone*, 192 F.2d 121 (7th Cir. 1951).

180. *United States v. Silverstein*, 314 F.2d 789 (2d Cir. 1963); *United States v. MacDonald*, 313 F.2d 832 (2d Cir. 1963); *In re Turner*, 309 F.2d 69 (2d Cir. 1962); Application of *Colton*, 291 F.2d 487 (2d Cir. 1961); *O'Connor v. O'Connell*, 253 F.2d 365 (1st Cir. 1958); *Sale v. United States*, 228 F.2d 682 (8th Cir.), *cert. denied*, 350 U.S. 1006 (1956); *In re Albert Lindley Lee Memorial Hospital*, 209 F.2d 122 (2d Cir. 1953), *cert. denied sub nom.* *Cincotta v. United States*, 347 U.S. 960 (1954); *Falsone v. United States*, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953); *Brownson v. United States*, 32 F.2d 844 (8th Cir. 1929). In *First Nat. Bank v. United States*, 267 U.S. 576 (1925), *affirming per curiam* 295 Fed. 142 (S.D. Ala. 1924), the Supreme Court heard an appeal on the merits from such an order, but did not discuss the problem. *But cf.* *Goldfine v. Pastore*, 261 F.2d 519 (1st Cir. 1958), relating to records in the control of *Bernard Goldfine* or *Mildred Paperman*, where the court held that the "interim order" there involved was not appealable.

181. 31 U.S.L. WEEK 3415 (U.S. June 17, 1963).

In addition to indicating that disobedience of a subpoena of the Internal Revenue Service constitutes contempt, the Second Circuit, in *United States v. Becker*,<sup>182</sup> affirmed a conviction under section 7210 for failure to produce subpoenaed documents. With reference to this decision Circuit Judge Friendly stated in *Application of Colton* that "the criminal penalty of § 7210 is not contingent upon prior action under either § 7604(a) or § 7604(b); that is what the words say and we so applied them in *United States v. Becker* . . . ."<sup>183</sup>

Not only does the Internal Revenue Service have the oldest investigative subpoena powers, the most varied and harshest enforcement procedures, and probably the greatest number of issued subpoenas, but also the courts by and large have always been liberal in ordering enforcement of these subpoenas. Frequently the courts have compared the subpoena powers of this agency to those of a grand jury.<sup>184</sup> Some courts have been less liberal in enforcing subpoenas, however, in cases where the statute of limitations is in question or where the taxpayer contends that his books have already been inspected for the year in question. Section 6501(a) provides for a general statute of limitations of three years, which paragraph (e) extends to six years if the understatement of gross income for the year in question exceeds 25 per cent.<sup>185</sup> Section 7605(b) limits the Service to one inspection of the taxpayer's books for each taxable year unless "the Secretary . . . , after investigation, notifies the taxpayer in writing that an additional inspection is necessary."<sup>186</sup>

In *O'Connor v. O'Connell*<sup>187</sup> the court held that as a prerequisite to an enforcement order of a summons requiring a taxpayer to testify as to a year on which the statute has run, the service must establish a reasonable basis for suspicion of fraud.<sup>188</sup> The Ninth Circuit has made a few comparable rulings,<sup>189</sup> but

182. 259 F.2d 869 (2d Cir. 1958), *cert. denied*, 358 U.S. 929 (1959).

183. 291 F.2d 487, 489 (2d Cir. 1961).

184. See, e.g., *Sale v. United States*, 228 F.2d 682, 684-85 (8th Cir.), *cert. denied*, 350 U.S. 1006 (1956); *Falsone v. United States*, 205 F.2d 734, 737, 742 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953); *Brownson v. United States*, 32 F.2d 844, 848 (8th Cir. 1929); *United States v. First Nat'l Bank*, 173 F. Supp. 716, 720 (W.D. Ark. 1959); *Torras v. Stradley*, 103 F. Supp. 737, 739-40 (N.D. Ga. 1952); *Stone v. Frandle*, 89 F. Supp. 222, 225 (D. Minn. 1950).

185. INT. REV. CODE OF 1954, §§ 6501(a), 6501(e).

186. INT. REV. CODE OF 1954, § 7605(b).

187. 253 F.2d 365 (1st Cir. 1958).

188. *Id.* at 370.

189. *Hubner v. Tucker*, 245 F.2d 35 (9th Cir. 1957); *Local 174, International Bhd. of Teamsters v. United States*, 240 F.2d 387 (9th Cir. 1956) (investigation of the income tax returns of Frank W. Brewster and

these latter rulings were exceptional. In most of the circuit courts of appeals, the Internal Revenue Service has obtained almost everything requested in the court enforcement of its subpoenas. One of the strongest statements in its favor came from the second circuit in *Foster v. United States*,<sup>190</sup> the court stated that the relevancy test to be applied in determining the propriety of an enforcement order is "the same as that for materiality with respect to grand jury investigations . . . It is whether the inspection sought 'might have thrown light upon' the correctness of the taxpayer's returns . . . ." <sup>191</sup> Moreover, there are many cases in the various circuits enforcing subpoenas of the Internal Revenue Service, including subpoenas issued in investigations involving closed years.<sup>192</sup>

his wife); *Martin v. Chandis Securities Co.*, 128 F.2d 731 (9th Cir. 1942); *Arend v. De Masters*, 181 F. Supp. 761 (D. Ore. 1960). In the first two cases the court stressed the fact that those subpoenaed were third persons to the investigation. District Judge Irving R. Kaufman by way of dictum made the same point in *Application of Levine*, 149 F. Supp. 642, 643 (S.D. N.Y.), *aff'd per curiam*, 243 F.2d 175 (2d Cir. 1956): "The question of probable cause for such investigations comes into play when a third party is requested to produce records relating to the taxpayer under investigation." But the Court of Appeals for the Second Circuit, in the later case of *Foster v. United States*, 265 F.2d 183, 187 n.2 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959), qualified this dictum with the explanation: "The context makes it plain that by this was meant only that a motion to enforce a subpoena against a third party should show some connection between the respondent and the taxpayer under investigation from which it may be reasonably believed that the respondent *may have* information relative to the investigation which justifies the burden of compliance."

190. 265 F.2d 183 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959).

191. *Id.* at 186-87. But in *Hubner v. Tucker*, 245 F.2d 35, 39 n.6 (9th Cir. 1957), the court drew a distinction between a grand jury investigation and that of an executive agency.

192. See, e.g., *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963), *affirming* 200 F. Supp. 541 (D. Minn. 1961); *Application of Magnus*, 299 F.2d 335 (2d Cir.), *cert. denied*, 370 U.S. 918 (1962); *Eberhart v. Broadrock Development Corp.*, 296 F.2d 685 (6th Cir. 1961), *cert. denied*, 369 U.S. 871 (1962); *Wall v. Mitchell*, 287 F.2d 31 (4th Cir. 1961); *McDermott v. John Baumgarth Co.*, 286 F.2d 864 (7th Cir. 1961); *Lash v. Nighosian*, 273 F.2d 185 (1st Cir. 1959), *cert. denied*, 362 U.S. 904 (1960); *National Plate & Window Glass Co. v. United States*, 254 F.2d 92 (2d Cir.), *cert. denied*, 358 U.S. 822 (1958); *Application of United States*, 246 F.2d 762 (2d Cir.), *cert. denied*, 355 U.S. 857 (1957); *Corbin Deposit Bank v. United States*, 244 F.2d 177 (6th Cir. 1957); *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1956); *Globe Constr. Co. v. Humphrey*, 229 F.2d 148 (5th Cir. 1956); *Sale v. United States*, 228 F.2d 682 (8th Cir.), *cert. denied*, 350 U.S. 1006 (1956); *Beatty v. United States*, 227 F.2d 350 (8th Cir. 1955); *Peoples Deposit Bank & Trust Co. v. United States*, 212 F.2d 86 (6th Cir.), *cert. denied*, 348 U.S. 838 (1954); *In re Albert Lindley Lee Memorial Hospital*, 209 F.2d 122 (2d Cir. 1953); *Falsone v. United States*, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953); *United States v. United Distillers Products Corp.*, 156 F.2d 872 (2d Cir. 1946); *Zimmermann v. Wilson*, 105 F.2d 583 (3d Cir. 1939); *Hincheliff v. Clarke*, 205 F. Supp. 1 (N.D. Ohio 1961).



The Service was one of the agencies, along with the FCC, the FTC, and the SEC that retained its previous restrictions on the right of subpoenaed persons to counsel despite the passage of the Administrative Procedure Act. The courts, as has been seen, at first sustained these restrictions,<sup>193</sup> but in *Backer v. Commissioner*<sup>194</sup> finally held section 6(a) of the Administrative Procedure Act to be fully applicable.

### 17. Interstate Commerce Commission.

The Interstate Commerce Commission has subpoena powers under four acts: part I<sup>195</sup> of the Interstate Commerce Act, passed in 1887; part II,<sup>196</sup> originally passed as the Motor Carrier Act of 1935,<sup>197</sup> part III,<sup>198</sup> the Water Carrier Act of 1940; and part IV,<sup>199</sup> the Freight Forwarders Act of 1942. The compulsory testimony provision is contained in the 1893 amendment to the Interstate Commerce Act.<sup>200</sup> Under the 1893 act, an individual obtained immunity without claiming his privilege against self-incrimination.<sup>201</sup> In the early case of *Brown v. Walker*<sup>202</sup> and in the recent case of *Brown v. United States*,<sup>203</sup> the Supreme Court specifically sustained the validity of this compulsory testimony provision.

In *ICC v. Brimson*<sup>204</sup> the Supreme Court set the pattern for

193. *Torras v. Stradley*, 103 F. Supp. 737 (N.D. Ga. 1952); *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949). See text accompanying notes 28 & 29 *supra*.

194. 275 F.2d 141 (5th Cir. 1960). In *In re Neil*, 209 F. Supp. 76 (S.D. W. Va. 1962), the court ruled that under section 6(b) subpoenaed witnesses were to "be furnished a copy of the official transcript of their testimony without first being required to sign the original thereof." *Id.* at 79. But in *United States v. Murray*, 297 F.2d 812, 820-21 (2d Cir.), *cert. denied*, 369 U.S. 828 (1962), the court held that section 6(b) did not apply to statements which a taxpayer made voluntarily.

195. 24 Stat. 383 (1887), as amended, 49 U.S.C. § 12 (1958).

196. 49 Stat. 548, 550 (1935), as amended, 49 U.S.C. § 305(d) (1958).

197. 49 Stat. 543. The Water Carrier Act changed the short title to "part II of the Interstate Commerce Act." 54 Stat. 919 (1940).

198. 54 Stat. 946, 49 U.S.C. § 916 (1958).

199. 56 Stat. 746, 49 U.S.C. § 1017 (1958).

200. 27 Stat. 443 (1893), 49 U.S.C. § 46 (1958).

201. See *United States v. Monia*, 317 U.S. 424 (1943).

202. 161 U.S. 591 (1896).

203. 359 U.S. 41 (1959). For a history of compulsory testimony provisions, see ROGGE, *THE FIRST AND THE FIFTH* 204-08 (1960); Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 163, 375-83 (1956-57).

Although the compulsory testimony provision contains a broad grant of immunity, the right to counsel is limited to representation by a practitioner. 49 C.F.R. § 1.71(a) (1963).

204. 154 U.S. 447 (1894).

court enforcement of administrative subpoenas. Referring to the ICC's power to enforce its own subpoenas, the Court stated:

Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. . . . Of course, the question of punishing the defendants for contempt could not arise before the Commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the Circuit Court, is determined adversely to the defendants and they refuse to obey, not the order of the Commission, but the final order of the court. . . .<sup>205</sup>

In an earlier case, *Anderson v. Dunn*,<sup>206</sup> involving contempt of the federal House of Representatives, the Court expressed a similar dictum: "[N]either analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body."<sup>207</sup>

Whether, in the light of the Court's current attitude toward the enforcement of investigative subpoenas and orders of administrative agencies, as expressed in such cases as *CAB v. Hermann*<sup>208</sup> and *St. Regis Paper Co. v. United States*,<sup>209</sup> these dicta still represent the law is an open question. Like the FTC, the ICC has witnessed a reversal of the Court's attitude toward administrative investigations. In *Harriman v. ICC*<sup>210</sup> the Court in an opinion by Mr. Justice Holmes, held that the ICC could not require testimony in an investigation begun on its own motion. In *Ellis v. ICC*<sup>211</sup> the Court, again in an opinion by Mr. Justice Holmes, concluded that the ICC had no authority to conduct "a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up."<sup>212</sup> The result in this case foretold the similar decision by a unanimous Court in *FTC v. American Tobacco Co.*<sup>213</sup>

Congress sought to alter the *Harriman* result by expressly giving the ICC authority to investigate, on its own motion, any matter "concerning which any question may arise under any of the provisions of this Act,"<sup>214</sup> and the Court accepted the alteration in

205. *Id.* at 485, 488-89.

206. 19 U.S. (6 Wheat.) 204 (1821).

207. *Id.* at 233-34.

208. 353 U.S. 322 (1957). See text accompanying note 3 *supra*.

209. 368 U.S. 208 (1961).

210. 211 U.S. 407 (1908).

211. 237 U.S. 434 (1915).

212. *Id.* at 445.

213. 264 U.S. 298 (1924). See text accompanying note 1 *supra*.

214. 36 Stat. 551 (1910), 49 U.S.C. § 13(2) (1958). The Motor Carrier Act of 1935, 49 Stat. 547, as amended, 49 U.S.C. §§ 304(a)(4a), 304(c)

*Smith v. ICC.*<sup>215</sup> The "fishing expedition" objection to administrative investigations was abolished by *United States v. Morton Salt Co.*<sup>216</sup>

### 18. Labor Department.

The six separate provisions that empower the Secretary of Labor or his delegate to investigate with the aid of subpoenas occur, in the order of their enactment, in the United States Employees' Compensation Act,<sup>217</sup> the Walsh-Healey Public Contracts Act,<sup>218</sup> the Fair Labor Standards Act of 1938,<sup>219</sup> a 1958 amendment to the Longshoremen's and Harbor Workers' Compensation Act,<sup>220</sup> the Labor-Management Reporting and Disclosure Act of 1959,<sup>221</sup> and a 1962 amendment to the Welfare and Pension Plans Disclosure Act.<sup>222</sup> Only three of these acts contain compulsory testimony provisions. These three, the Fair Labor Standards Act of 1938,<sup>223</sup> the Labor-Management Reporting and Disclosure Act of 1959,<sup>224</sup> and the 1962 amendment to the Welfare and Pension Plans Disclosure Act,<sup>225</sup> all adopt the enforcement procedures of the Federal Trade Commission Act, including the criminal sanctions.

Because contested cases involving the enforcement of investigative subpoenas of the Labor Department are so recent, the courts have generally enforced such subpoenas after only a negligible amount of judicial examination. The rules for enforcement were laid down in *Endicott Johnson Corp. v. Perkins*,<sup>226</sup> which arose under the Walsh-Healey Public Contracts Act, relating to minimum

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(1958), the Water Carrier Act, 54 Stat. 946 (1940), 49 U.S.C. § 916(c) (1958), and the Freight Forwarders Act, 56 Stat. 746 (1942), 49 U.S.C. § 1017(c) (1958) empowered the ICC, in certain areas, to proceed on its own motion.

215. 245 U.S. 33 (1917).

216. 338 U.S. 632 (1950).

217. 39 Stat. 748 (1916), 5 U.S.C. § 780 (1958). This act was at first administered by the United States Employees' Compensation Commission. This body was abolished in 1946, and its functions were transferred to the Federal Security Agency, Reorganization Plan No. 2 of 1946, § 3, 60 Stat. 1095 (1946). In 1950 the relevant functions of the Federal Security Administrator were transferred to the Secretary of Labor. Reorganization Plan No. 19 of 1940, 64 Stat. 1271 (1950).

218. 49 Stat. 2038 (1936); 41 U.S.C. § 39 (1958).

219. 52 Stat. 1065, 29 U.S.C. § 209 (1958).

220. 72 Stat. 835, 33 U.S.C. § 941(b) (1958).

221. 73 Stat. 539, 29 U.S.C.A. § 521 (Supp. 1962).

222. 76 Stat. 37, 29 U.S.C.A. § 308 (Supp. 1962).

223. 52 Stat. 1065 (1938), as amended, 29 U.S.C. § 209 (1958).

224. 73 Stat. 539 (1959), 29 U.S.C.A. § 521(b) (Supp. 1962).

225. 72 Stat. 1002 (1958), 29 U.S.C. § 308(e) (1958).

226. 317 U.S. 501 (1943).

wages and hours of labor of persons employed on government contracts, and in *Oklahoma Press Publishing Co. v. Walling*,<sup>227</sup> involving the Fair Labor Standards Act of 1938. In *Endicott Johnson Corp.* the district court refused to enforce the subpoena because the Secretary of Labor sought evidence of underpayment before she had made a decision on the question of coverage. Instead, the court tried the issue of coverage itself and decided it against the Secretary. The Supreme Court, however, held the district court in error for deciding the coverage issue and ordered the enforcement of the subpoena.<sup>228</sup> In the *Oklahoma Press Publishing Co.* case, the Court compared the role of the Administrator of the Fair Labor Standards Act of 1938 to that of a grand jury and held that if his investigation was for a lawfully authorized purpose, his subpoena should be enforced.<sup>229</sup>

In two recent cases under the Labor-Management Reporting and Disclosure Act of 1959, United States courts of appeals held that no showing of probable cause was necessary for the enforcement of administrative subpoenas.<sup>230</sup> In the first of these, the court reasoned that if a showing of probable violation of the act were a condition precedent to investigation, the Secretary would be stripped of his power to investigate.<sup>231</sup> Holdings such as this reduce the role of courts to that of pro forma enforcement agencies for administrative subpoenas.

In addition to the assurance that Labor Department subpoenas will be enforced, the Secretary of Labor is empowered to "utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees. . . ."<sup>232</sup>

227. 327 U.S. 186 (1946).

228. 317 U.S. at 509.

229. 327 U.S. at 209, 216. There were many comparable rulings. See, e.g., *Tobin v. Banks & Rumbaugh*, 201 F.2d 223 (5th Cir.), cert. denied, 345 U.S. 942 (1953); *McComb v. Hunsaker Trucking Contractor, Inc.*, 171 F.2d 523 (5th Cir. 1948); *Walling v. La Belle S.S. Co.*, 148 F.2d 198 (6th Cir. 1945); *Walling v. Golebiewski*, 142 F.2d 1015 (2d Cir. 1944); *Walling v. Benson*, 137 F.2d 501 (8th Cir.), cert. denied, 320 U.S. 791 (1943); *Mississippi Rd. Supply Co. v. Walling*, 136 F.2d 391 (5th Cir.), cert. denied, 320 U.S. 752 (1943); *Walling v. American Rolbal Corp.*, 135 F.2d 1003 (2d Cir. 1943); *Martin Typewriter Co. v. Walling*, 135 F.2d 918 (1st Cir. 1943); *Walling v. Standard Dredging Corp.*, 132 F.2d 322 (2d Cir.), affirming per curiam 44 F. Supp. 601 (S.D.N.Y. 1942), cert. denied, 319 U.S. 761 (1943); *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384 (7th Cir.), cert. denied, 311 U.S. 690 (1940).

230. *International Bhd. of Teamsters v. Goldberg*, 303 F.2d 402 (D.C. Cir.), cert. denied, 370 U.S. 938 (1962); *Goldberg v. Truck Drivers Local 299*, 293 F.2d 807 (6th Cir.), cert. denied, 368 U.S. 938 (1961).

231. *Id.* at 812.

232. 73 Stat. 540 (1959), 29 U.S.C.A. § 527 (Supp. 1962).

Pursuant to this provision, the Secretary of Labor and the Attorney General published a *Memorandum of Understanding* by which, on an ad hoc basis, the Department of Justice under delegation from the Secretary of Labor was to investigate criminal matters arising under certain portions of the act.<sup>233</sup> This agreement was sustained in *Goldberg v. Battles*<sup>234</sup> despite the objection that it constituted a delegation of authority repugnant to "all principles of Anglo-American jurisprudence."<sup>235</sup>

The procedure sustained in this case becomes more arresting upon reflection that, except for grand jury subpoenas, neither the Department of Justice nor the FBI has investigative subpoena powers. Moreover, aside from such specific acts or provisions as the Immunity Act of 1954,<sup>236</sup> which is limited to investigations into treason, sabotage, espionage, sedition, seditious conspiracy, and the overthrow of the government by force and violence, neither the Department of Justice nor the FBI has available to it any general compulsory testimony provision. Once again, as in the comparable mingling of prosecutive and adjudicative functions in the special inquiry officers of the Immigration and Naturalization Service, this is reminiscent of the powers of the French *Juge d'Instruction*, to be discussed later.

The rules and regulations of the Labor Department do not provide for counsel in investigative hearings.<sup>237</sup> There is, however, provision for counsel in adjudicatory proceedings such as those conducted under the Longshoremen's and Harbor Workers' Compensation Act.<sup>238</sup>

### 19. National Labor Relations Board.

The National Labor Relations Board has the authority to investigate petitions relating to union representation of employees<sup>239</sup> and unfair labor practices.<sup>240</sup> Although the Board's rules and reg-

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233. 25 Fed. Reg. 1708 (1960).

234. 196 F. Supp. 749 (E.D. Pa. 1961), *aff'd per curiam*, 299 F.2d 937 (3d Cir.), *cert. denied*, 371 U.S. 817 (1962).

235. 196 F. Supp. at 755. *Cf. Serio v. Liss*, 189 F. Supp. 358 (D.N.J. 1960), *aff'd*, 300 F.2d 386 (3d Cir. 1961), where the court stated: "The Attorney General was, therefore, amply authorized to investigate (in behalf of the Secretary) the incumbency of the plaintiff in the office of business agent of the defendant Local and to express to that defendant his belief that the plaintiff was illegally occupying his office." 189 F. Supp. at 364.

236. 68 Stat. 745, 18 U.S.C. § 3486 (1958).

237. See, e.g., 29 C.F.R. §§ 13.6, 521.10, 525.14 (1963).

238. 29 C.F.R. § 12.10(a) (1963). See also 41 C.F.R. § 50-203.8(f) (1963).

239. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(c) (1958).

240. 61 Stat. 146 (1947), 29 U.S.C. § 160(l) (1958).

ulations do not provide for counsel in investigative proceedings,<sup>241</sup> they either provide for or contemplate the right of representation in adjudicative hearings.<sup>242</sup> The National Labor Relations Act contains a grant of subpoena powers and a compulsory testimony provision of the type that began with the Securities Act of 1933.<sup>243</sup>

In the field of labor there are thus seven different statutes that confer investigative powers. Four of the seven also contain compulsory testimony provisions, but even these are not all alike. Three of these four, those relating to the Labor Department, have the older kind of immunity provision, which gives a subpoenaed witness immunity whether he claims his privilege against self-incrimination or not.

## 20. *National Wage Stabilization Board.*

The War Labor Disputes Act<sup>244</sup> conferred on the chairman of the National War Labor Board<sup>245</sup> investigative subpoena powers<sup>246</sup> similar to those given to the President by title III of the Second War Powers Act of 1942.<sup>247</sup> This included a compulsory testimony provision under which subpoenaed persons had to claim their privilege against self-incrimination to obtain immunity.

On December 31, 1945 the President created within the Department of Labor the National Wage Stabilization Board and transferred to it the powers and functions, including subpoena powers, of the National War Labor Board relating to the stabilization of wages and salaries.<sup>248</sup> The courts have enforced investigative sub-

241. See, e.g., 29 C.F.R. §§ 101.4, 101.18, 101.22, 101.27, 101.32, 102.63, 102.77 & 102.85 (1963).

242. See, e.g., 29 C.F.R. §§ 101.10, 101.20, 101.30, 101.34, 102.38, 102.66, 102.86 & 102.90 (1963).

243. 49 Stat. 455 (1935), as amended, 29 U.S.C. § 161 (1958).

The courts have been quite liberal in enforcing the Board's subpoenas. See, e.g., *Lewis v. NLRB*, 357 U.S. 10 (1958); *NLRB v. Duval Jewelry Co.*, 357 U.S. 1 (1958); *NLRB v. C.C.C. Associates*, 306 F.2d 534 (2d Cir. 1962); *NLRB v. United Aircraft Corp.*, 300 F.2d 442 (2d Cir. 1962), *affirming per curiam* 200 F. Supp. 48 (D. Conn. 1961); *Storkline Corp. v. NLRB*, 298 F.2d 276 (5th Cir. 1962); *NLRB v. Kingston Trap Rock Co.*, 222 F.2d 299 (3d Cir. 1955); *Jackson Packing Co. v. NLRB*, 204 F.2d 842 (5th Cir. 1953); *NLRB v. Anchor Rome Mills*, 197 F.2d 447 (5th Cir. 1952); *Edwards v. NLRB*, 189 F.2d 970 (5th Cir.), *cert. denied*, 342 U.S. 870 (1951); *NLRB v. John S. Barnes Corp.*, 178 F.2d 156 (7th Cir. 1949); *D.G. Bland Lumber Co. v. NLRB*, 177 F.2d 555 (5th Cir. 1949); *NLRB v. Northern Trust Co.*, 148 F.2d 24 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945); *NLRB v. Barrett Co.*, 120 F.2d 583 (7th Cir. 1941); *NLRB v. Thayer, Inc.*, 201 F. Supp. 602 (D. Mass. 1962); *NLRB v. Roddy Mfg. Co.*, 165 F. Supp. 412 (E.D. Tenn. 1958).

244. 57 Stat. 163 (1943).

245. Created by Exec. Order No. 9017, 7 Fed. Reg. 237 (1942).

246. Act of June 25, 1943, ch. 144, §§ 7(a), (b), 57 Stat. 166.

247. 56 Stat. 177, 179, 50 U.S.C. App. §§ 633, 1152(a)(4) (1958).

248. Exec. Order No. 9672, 11 Fed. Reg. 221 (1946).

poenas of the Chairman of the National War Labor Board<sup>249</sup> as well as of the Chairman of the National Wage Stabilization Board.<sup>250</sup>

## 21. Office of Price Administration.

The Emergency Price Control Act of 1942 created the Office of Price Administration under the direction of a Price Administrator.<sup>251</sup> The Administrator had investigative subpoena powers, supplemented by a compulsory testimony provision under which a subpoenaed person had to claim his privilege against self-incrimination to obtain immunity.<sup>252</sup>

The courts were as liberal in enforcing OPA subpoenas as those of any of the administrative agencies. In *Bowles v. Baer*<sup>253</sup> the Court of Appeals for the Seventh Circuit, after comparing OPA investigations to grand jury proceedings, held that subpoenaed persons were not entitled either to counsel or to their own reporter.<sup>254</sup> In *Shapiro v. United States*<sup>255</sup> the Supreme Court announced its required records inroad on the fifth amendment's privilege against self-incrimination; the court reasoned that since the records in question were required by OPA regulations, they were public documents not within the scope of the fifth amendment's privilege.

The courts enforced the Price Administrator's subpoenas and inspection orders despite "fishing expedition"<sup>256</sup> and "no showing

249. In *Troy Laundry Co. v. Lockwood*, 63 F. Supp. 384, 385 (S.D. Cal. 1945), the court, in dismissing an amended complaint for injunctive relief, held that there could be no judicial interference with the subpoena power of the National War Labor Board "upon the ground that the power might be abused by those conducting the investigation." *But cf.* *S & W Cafeteria v. Aird*, 60 F. Supp. 599 (E.D. Tenn. 1945).

250. In *Troy Laundry Co. v. Wirtz*, 155 F.2d 53, 57 (9th Cir.), *cert. denied*, 329 U.S. 723 (1946), the chairman of the National Wage Stabilization Board substituted for the chairman of the National War Labor Board, and the court affirmed an enforcement order despite the objection that "the knowledge of the documents sought was obtained by a prior illegal search."

251. Act of Jan. 30, 1942, ch. 26, § 201, 56 Stat. 29.

252. Emergency Price Control Act of 1942, ch. 26, § 202, 56 Stat. 30 (1942).

253. 142 F.2d 787 (7th Cir. 1944).

254. *Id.* at 789.

255. 335 U.S. 1 (1948). *But in* *Smith v. United States*, 337 U.S. 137 (1949), the Court held that the subpoenaed petitioner did obtain immunity. However, Smith was subsequently convicted for income tax evasion for one of the years as to which he testified and two later years. *United States v. Smith*, 206 F.2d 905 (3d Cir. 1953).

256. *Dossett v. Porter*, 161 F.2d 839 (6th Cir.), *cert. denied*, 332 U.S. 771 (1947); *Provenzano v. Porter*, 159 F.2d 47 (9th Cir. 1946), *cert.*

of probable cause"<sup>257</sup> objections and claims that such subpoenas and orders violate the fourth amendment's provision against unreasonable searches and seizures<sup>258</sup> and the fifth amendment's privilege against self-incrimination.<sup>259</sup> The basis of these enforcements was the "presumption of regularity attending acts of administrative agencies."<sup>260</sup>

In December, 1946 the President consolidated the OPA and three other agencies into the Office of Temporary Controls.<sup>261</sup> In one case in which the Temporary Controls Administrator substituted for the Price Administrator, who had resigned, the Court held that the Price Administrator could delegate to district directors authority to sign and issue subpoenas.<sup>262</sup>

## 22. *Pacific Railway Commission.*

In the month after the enactment of the first Interstate Commerce Act, Congress created the Pacific Railway Commission to investigate railroads that had received aid from the federal government and gave the commissioners investigative subpoena powers.<sup>263</sup> If a subpoenaed person was contumacious, any circuit or

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*denied*, 331 U.S. 816 (1947); *Bowles v. Shawano Nat'l Bank*, 151 F.2d 749 (7th Cir. 1945), *cert. denied*, 327 U.S. 781 (1946).

257. *Dossett v. Porter*, 161 F.2d 839 (6th Cir.), *cert. denied*, 332 U.S. 771 (1947); *Provenzano v. Porter*, 159 F.2d 47 (9th Cir. 1946), *cert. denied*, 331 U.S. 816 (1947); *Raley v. Porter*, 156 F.2d 561 (D.C. Cir. 1946), *aff'd sub nom. Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947); *Hagen v. Porter*, 156 F.2d 362 (9th Cir.), *cert. denied*, 329 U.S. 729 (1946); *Bowles v. Insel*, 148 F.2d 91 (3d Cir. 1945).

258. *Porter v. Murray*, 156 F.2d 781 (1st Cir. 1946), *petition for cert. dismissed on motion of petitioner*, 330 U.S. 804 (1947); *Hagen v. Porter*, 156 F.2d 362 (9th Cir.), *cert. denied*, 329 U.S. 729 (1946); *Porter v. Mueller*, 156 F.2d 278 (3d Cir. 1946); *Bowles v. Insel*, 148 F.2d 91 (3d Cir. 1945); *cf. Bowles v. Glick Bros. Lumber Co.*, 146 F.2d 566 (9th Cir.), *cert. denied*, 325 U.S. 877 (1945).

259. *Dossett v. Porter*, 161 F.2d 839 (6th Cir.), *cert. denied*, 332 U.S. 771 (1947) (required records exception); *Hagen v. Porter*, 156 F.2d 362 (9th Cir.), *cert. denied*, 329 U.S. 729 (1946) (same); *Porter v. Mueller*, 156 F.2d 278 (3d Cir. 1946) (same); *Cudmore v. Bowles*, 145 F.2d 697 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 841 (1945); *cf. Bowles v. Glick Bros. Lumber Co.*, 146 F.2d 566 (9th Cir.), *cert. denied*, 325 U.S. 877 (1945).

260. *Bowles v. Northwest Poultry & Dairy Prods. Co.*, 153 F.2d 32, 34 (9th Cir. 1946). For other cases where the courts ordered enforcement of the Price Administrator's subpoenas or inspection orders, see *Porter v. Gantner & Mattern Co.*, 156 F.2d 886 (9th Cir. 1946); *Pinkus v. Porter*, 155 F.2d 90 (2d Cir. 1946); *Porter v. McColloch*, 154 F.2d 876 (9th Cir. 1946); *Bowles v. Bay of New York Coal & Supply Corp.*, 152 F.2d 330 (2d Cir. 1945); *Bowles v. Abendroth*, 151 F.2d 407 (9th Cir. 1945); *Bowles v. Rothman*, 145 F.2d 831 (2d Cir. 1944).

261. Exec. Order No. 9809, 11 Fed. Reg. 14281 (1946).

262. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947).

263. Act of March 3, 1887, ch. 345, § 2, 24 Stat. 488, 491.



district court of the United States within whose jurisdiction the inquiry was being conducted could order that person to appear before the appropriate commissioner. The compulsory testimony provision was held, in *Counselman v. Hitchcock*,<sup>264</sup> to be too narrow to be effective.

The Commission's application for enforcement of its investigative subpoena against Leland Stanford was denied in *In the Matter of Pacific Ry. Comm'n* in 1887.<sup>265</sup> At this early date the court was of the opinion that it should not participate in an administrative investigation.<sup>266</sup> Of course, this was before *ICC v. Brimson*,<sup>267</sup> in which the Supreme Court held that a comparable application under the Interstate Commerce Act did constitute a "case" to which federal judicial power constitutionally extended.<sup>268</sup>

### 23. *The President.*

The Second War Powers Act of 1942<sup>269</sup> and the Defense Production Act of 1950, as amended by the Defense Production Act Amendments of 1951,<sup>270</sup> gave investigative subpoena powers to the President. Under the 1942 act, the President may subpoena the attendance and testimony of a witness and any books, records, or other evidence that may be relevant to the inquiry; the 1950 act empowered the President by subpoena "to take the sworn testimony of, any person as may be necessary or appropriate."<sup>271</sup> In order to clarify any doubt as to the President's investigative powers, the 1951 amendments added, after "testimony of," the words "and administer oaths and affirmations to." Both acts contain compulsory testimony provisions that require subpoenaed persons to claim their privilege against self-incrimination to obtain immunity. Moreover, the Second Decontrol Act of 1947<sup>272</sup> exempted the President's inquisitive functions under the 1942 act from all provisions of the Administrative Procedure Act except sections 3 and 10, which relate to the publication of information and to judicial review of agency action. The President's inquisitive functions under the 1950 act as amended were extended to June 30, 1964.<sup>273</sup>

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264. 142 U.S. 547 (1892).

265. 32 Fed. 241 (N.D. Cal. 1887).

266. *Id.* at 258.

267. 154 U.S. 447 (1894).

268. U.S. CONST. art. III, § 2.

269. 56 Stat. 177, 179, 50 U.S.C. App. §§ 633, 1152(a)(4) (1958).

270. 64 Stat. 816, 65 Stat. 139, 50 U.S.C. App. § 2155 (1958).

271. *Ibid.*

272. Act of July 15, 1947, ch. 248, § 5, 61 Stat. 323.

273. 76 Stat. 112 (1962), 50 U.S.C.A. App. § 2166(a) (Supp. 1962).

During World War II the President delegated his powers applicable to the nation's food program to the Secretary of Agriculture and the War Food Administrator.<sup>274</sup> They in turn delegated their subpoena powers to "all persons now or hereafter employed as attorneys in the Office of the Solicitor."<sup>275</sup> In *United States v. Cream Prods. Distrib. Co.*,<sup>276</sup> the court sustained these delegations over objections that a subpoena duces tecum constitutes a fishing expedition, and violates the fourth amendment's provision against unreasonable searches and seizures and the fifth amendment's privilege against self-incrimination.

The day after the enactment of the 1950 act, the President created an Economic Stabilization Agency, under an Administrator, and within the Agency, a Director of Price Stabilization.<sup>277</sup> The Administrator created the Office of Price Stabilization. The courts enforced the subpoenas of the Director of the OPS as generously as they did those of the Administrator of the OPA. In one case, the Court of Appeals for the Ninth Circuit affirmed an inspection order over objections that the demanded documents were not relevant to the purpose of the inquiry, that there was an absence of probable cause, and that the inspection order amounted to harassment. The court stated that probable cause is not a prerequisite to inspection and that harassment is not a proper objection to a subpoena.<sup>278</sup> In another case, the same court sustained such an order despite objections that it violated the fourth amendment's provision against unreasonable searches and seizures and the fifth amendment's privilege against self-incrimination and that it constituted harassment.<sup>279</sup> To defeat the claim of privilege, the court applied the required records exception that the Supreme Court announced in *Shapiro v. United States*.<sup>280</sup> One district court, in compelling the production of documents before a district enforcement director, summarily dismissed an objection that this official was engaged in a fishing expedition,<sup>281</sup> while another district court, in ordering compliance with subpoenas duces tecum,

274. Exec. Orders Nos. 9280, 9322, 9334, 7 Fed. Reg. 10179 (1942), 8 Fed. Reg. 3807, 5423 (1943).

275. 10 Fed. Reg. 8183 (1945).

276. 156 F.2d 732 (7th Cir. 1946).

277. Exec. Order No. 10161, §§ 401(a), 402, 15 Fed. Reg. 6105, 6106 (1950).

278. *Westside Ford v. United States*, 206 F.2d 627, 632, 635 (9th Cir. 1953).

279. *Wockner v. United States*, 211 F.2d 490 (9th Cir. 1954).

280. 335 U.S. 1 (1948).

281. *In re Bleichfeld Bag & Burlap Co.*, 105 F. Supp. 162 (W.D.N.Y. 1952).

refused to permit counsel for the subpoenaed persons to be present during the investigation.<sup>282</sup>

A third act, the Trading with the Enemy Act, passed during World War I, as amended, empowers the President during the time of war or any other period of national emergency to investigate transactions with any foreign country or its nationals and commands him to "require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to."<sup>283</sup> The act contains no compulsory testimony provision.

In 1942 the President delegated these powers to the Secretary of the Treasury.<sup>284</sup> The courts have enforced administrative orders in the nature of subpoenas duces tecum of the acting director of the Foreign Assets Control Division of the Treasury Department.<sup>285</sup> But one court indicated that, apart from records held in a representative capacity and records falling within the required records doctrine, it would sustain a claim of the privilege against self-incrimination.<sup>286</sup>

#### 24. *Securities and Exchange Commission.*

Like the Agriculture Department and the Labor Department, the Securities and Exchange Commission administers six different statutes that contain provisions under which one-man investigators with subpoena powers function. In chronological order, these provisions are in the Securities Act of 1933,<sup>287</sup> the Securities Exchange Act of 1934,<sup>288</sup> the Public Utility Holding Company Act of 1935,<sup>289</sup> the Trust Indenture Act of 1939,<sup>290</sup> the Investment Company Act of 1940,<sup>291</sup> and the Investment Advisers Act of 1940.<sup>292</sup> All six acts contain compulsory testimony provisions under which subpoenaed persons first have to claim their privilege to obtain immunity.

Aside from an early case, *Jones v. SEC*,<sup>293</sup> in which Mr. Jus-

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282. Application of Compton, 101 F. Supp. 547 (N.D. Tex. 1951).

283. 40 Stat. 415 (1917), 50 U.S.C. App. § 5(b) (1958).

284. 7 Fed. Reg. 1409 (1942).

285. *Wagman v. Arnold*, 257 F.2d 272 (2d Cir. 1958), *affirming in part and reversing in part* 152 F. Supp. 637 (S.D.N.Y. 1957); *In re Indusco, Inc.*, 15 F.R.D. 7 (S.D.N.Y. 1953).

286. *Wagman v. Arnold*, 257 F.2d 272 (2d Cir. 1958).

287. 48 Stat. 85, 86, 15 U.S.C. §§ 77s, 77v (1958).

288. 48 Stat. 899, 15 U.S.C. § 78u (1958).

289. 49 Stat. 831, 15 U.S.C. § 79r (1958).

290. 53 Stat. 1174, 15 U.S.C. § 77uuu (1958).

291. 54 Stat. 842, 15 U.S.C. § 80a-41 (1958).

292. 54 Stat. 853, 15 U.S.C. § 80b-9 (1958).

293. 298 U.S. 1 (1936).

tice Sutherland for the Court brought forward the "fishing expedition" objection to administrative investigations,<sup>294</sup> the SEC's subpoenas have usually been enforced. In the case of *Penfield Co. v. SEC*,<sup>295</sup> the Court affirmed the Ninth Circuit in its substitution of imprisonment for a fine, the imprisonment to continue until the subpoenaed witness produced the documents in question. Mr. Justice Frankfurter in a dissenting opinion, in which Mr. Justice Jackson joined, cautioned that "courts were not to be automata carrying out the wishes of the administrative."<sup>296</sup> The next month, in *Fleming v. Mohawk Wrecking & Lumber Co.*,<sup>297</sup> Mr. Justice Jackson, in a concurring opinion, referred to this dissent in expressing the fear that in the enforcement of administrative subpoenas, courts were tending "to be shorn of their power of independent inquiry."<sup>298</sup> Three terms later Mr. Justice Jackson delivered the Court's opinion in *United States v. Morton Salt Co.*,<sup>299</sup> apparently convinced that the growing necessity of investigative expediency had outdated his earlier position.

Despite the adoption of the Administrative Procedure Act, the SEC, as has been seen, restricts subpoenaed witnesses in their choice of counsel and then limits counsel in their role. Several cases have brushed aside "fishing expedition" objections.<sup>300</sup> In one of these, *McGarry v. SEC*,<sup>301</sup> the court stated that there was no basis for the contention.<sup>302</sup> In various additional cases the courts, comparing SEC investigations to grand jury proceedings,<sup>303</sup> overruled objections that the SEC was without jurisdiction, that the subpoenas violated the fifth amendment's privilege against self-incrimination, that there was no showing of probable cause, that the subpoenas were too broad and exploratory, that they were

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294. *Id.* at 26.

295. 330 U.S. 585 (1947), *affirming* 157 F.2d 65 (9th Cir. 1946).

296. 330 U.S. at 604.

297. 331 U.S. 111 (1947).

298. *Id.* at 124.

299. 338 U.S. 632 (1950).

300. *McGarry v. SEC*, 147 F.2d 389 (10th Cir. 1945); *In re Verser-Clay Co.*, 98 F.2d 859 (10th Cir. 1938), *cert. denied*, 306 U.S. 639 (1939); *Consolidated Mines v. SEC*, 97 F.2d 704 (9th Cir. 1938); *Newfield v. Ryan*, 91 F.2d 700 (5th Cir.), *cert. denied*, 302 U.S. 729 (1937); *McMann v. SEC*, 87 F.2d 377 (2d Cir.), *affirming* 16 F. Supp. 446 (S.D.N.Y. 1936), *cert. denied*, 301 U.S. 684 (1937).

301. 147 F.2d 389 (10th Cir. 1945).

302. 147 F.2d at 392.

303. See, e.g., *Consolidated Mines v. SEC*, 97 F.2d 704 (9th Cir. 1938); *Woolley v. United States*, 97 F.2d 258 (9th Cir.), *cert. denied*, 305 U.S. 614 (1938); *In re SEC*, 14 F. Supp. 417 (S.D.N.Y.), *aff'd*, 84 F.2d 316 (2d Cir.), *rev'd for mootness sub nom.* *Bracken v. SEC*, 299 U.S. 504 (1936).

too vague and uncertain, that they were unreasonable and unnecessarily burdensome, and that the documents sought were not relevant to the inquiry.<sup>304</sup>

## 25. *United States Tariff Commission.*

The Commission is empowered to issue subpoenas for any investigation authorized by law.<sup>305</sup> Under the Tariff Act of 1930,<sup>306</sup> this body is empowered to investigate the administration, the fiscal and industrial effects, and the operation of customs laws, the tariff relations between the United States and foreign countries, and upon either sworn complaint or its own initiative, unfair import practices. It is commanded to make such investigations as the President, either branch of Congress, the Senate Finance Committee, or the House Ways and Means Committee request.<sup>307</sup> There is no compulsory testimony provision. The rules and regulations of the Commission provide for representation only in public hearings.<sup>308</sup>

## 26. *Veterans' Administration.*

The third administrative or executive official with investigative subpoena powers was the predecessor of the Administrator of the Veterans' Administration, the Commissioner of Pensions. The initial act, passed in 1882, did not, however, empower the Commissioner himself to issue subpoenas, but rather, it empowered any judge or clerk of any federal court on the Commissioner's application to subpoena any witness within its jurisdiction.<sup>309</sup> There was no compulsory testimony provision, although the limited immunity

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304. *Mines & Metals Corp. v. SEC*, 200 F.2d 317 (9th Cir. 1952), *cert. denied*, 345 U.S. 941 (1953); *SEC v. Vacuum Can Co.*, 157 F.2d 530 (7th Cir. 1946), *cert. denied*, 330 U.S. 820 (1947); *SEC v. Minas de Artemisa*, 150 F.2d 215 (9th Cir. 1945); *SEC v. National Bank of Commerce*, CCH FED. SEC. L. REP. ¶ 91221 (W.D. Wash. April 23, 1963). *But cf.* *Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100 (D.C. Cir. 1939).

In *United States v. Eisele*, 52 F. Supp. 105 (D.D.C. 1943), and *United States v. Goodner*, 35 F. Supp. 286 (D. Colo. 1940), the court held that subpoenaed persons had obtained immunity from prosecution. In *Edwards v. United States*, 312 U.S. 473 (1941), the Court ruled that the defendant was entitled to an opportunity to prove this defense. However, he failed to do so. *Edwards v. United States*, 131 F.2d 198 (10th Cir.), *cert. denied*, 317 U.S. 689 (1942).

305. 46 Stat. 699 (1930), 19 U.S.C. § 1333 (1958).

306. 46 Stat. 590, 19 U.S.C. § 1001 (1958).

307. 46 Stat. 698, 703, 19 U.S.C. §§ 1332, 1337 (1958).

308. 19 C.F.R. § 201.13 (1963).

309. Act of July 25, 1882, ch. 349, § 2, 22 Stat. 175.

provision in section 860 of the Revised Statutes existed, which the Supreme Court held insufficient in *Counselman v. Hitchcock*.<sup>310</sup>

An early case,<sup>311</sup> relying on *In the Matter of Pacific Ry. Comm'n*,<sup>312</sup> refused to honor a request for an investigative subpoena under the 1882 act. A case<sup>313</sup> decided after *ICC v. Brimson*<sup>314</sup> held the 1882 act constitutional, but nevertheless denied the application of the Commissioner of Pensions by following a strict approach to the statute.

Two other early cases deserve discussion. In one case, *United States v. Bell*,<sup>315</sup> involving an indictment for perjury in an examination before a pension examiner, the court excluded the examination and acquitted the defendant because he was not advised of his privilege against self-incrimination.<sup>316</sup> In the other, *In re O'Shea*,<sup>317</sup> the court refused to hold a subpoenaed witness in contempt for declining to appear, basing its decision on the ground that the investigative proceeding was *ex parte*.<sup>318</sup>

Today, for investigations of any matter within the jurisdiction of the VA, the Administrator may subpoena persons within 100 miles of the hearing.<sup>319</sup> Also, there is still no compulsory testimony provision and no provision for counsel in investigative proceedings.

Although the Administrator of the VA has fared better in obtaining court aid in his investigative proceedings than his predecessor, the Commissioner of Pensions, he has not done as well as, for example, the Price Administrator. The courts have enforced his investigative subpoenas despite objections that he was exceeding his jurisdiction<sup>320</sup> and that his subpoena was oppressive, but the

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310. 142 U.S. 587 (1892).

311. *In re McLean*, 37 Fed. 648 (E.D.N.Y. 1888).

312. 32 Fed. 241 (N.D. Cal. 1887).

313. *In re Gross*, 78 Fed. 107 (E.D. La. 1897).

314. 154 U.S. 447 (1894).

315. 81 Fed. 830 (W.D. Tenn. 1897).

316. 81 Fed. at 853-54.

317. 166 Fed. 180 (D.N.J. 1908).

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The possibility of converting these administrative examinations into very obnoxious inquisitorial proceedings is apparent . . . [The defendants] should have notice of the time and place of the examination. Their attorney may represent them at the examination. And if, in the course of the examination, any questions are propounded to Miss O'Shea, the answers to which will tend to incriminate her, she may refuse to answer them . . . .

*Id.* at 183.

319. 72 Stat. 1237 (1958), 38 U.S.C. § 3311 (1958).

320. *General Trades School v. United States*, 212 F.2d 656 (8th Cir. 1954); *Carroll Vocational Institute v. United States*, 211 F.2d 539 (5th Cir.), *cert. denied*, 348 U.S. 833 (1954).

ninth circuit, in denying him relief, pointed out that there was "no power to compel a court to rubberstamp action of an administrative agency simply because the latter demands such action."<sup>321</sup> If courts have become little more than automata in the enforcement of administrative subpoenas, it appears that some judges still do not like to be reminded of this fact.

## 27. *Aberrant Instances.*

In addition to these two dozen and more executive and administrative agencies who have been invested with investigative subpoena powers, there were two aberrant instances of inquiries by officials, one of which the Supreme Court approved and the other of which the Court of Appeals for the Seventh Circuit condoned, that should have been condemned. One involved questioning by a federal district judge in camera, and the other by a prosecutor in private.

In *Levine v. United States*<sup>322</sup> a federal district judge cleared the courtroom and asked a grand jury witness the questions that the witness had refused to answer before the grand jury, claiming his privilege against self-incrimination. When he again refused, the judge sentenced him to a one-year prison term. The Supreme Court sustained this sentence although admittedly "the contemptuous conduct, the adjudication of guilt, and the imposition of sentence all took place after the public had been excluded from the courtroom."<sup>323</sup> The Court split five to four, as it so often does on close questions of this nature. Mr. Justice Black wrote a dissenting opinion in which Mr. Chief Justice Warren and Mr. Justice Douglas joined, and Mr. Justice Brennan wrote a dissenting opinion in which Mr. Justice Douglas likewise joined.

The other aberrant instance arose in *United States v. Standard Oil Co.*,<sup>324</sup> a Sherman Act case. A witness in a criminal trial had been subpoenaed to appear in the United States Attorney's office during hours when the court was not in session. He was denied the right to counsel in one of these after-hour proceedings. There was no legal basis whatever for this practice, but the court, although reversing judgments of conviction for other reasons, merely conceded that a witness could not be required to attend at

321. *Chapman v. Maren Elwood College*, 225 F.2d 230, 234 (9th Cir. 1955).

322. 362 U.S. 610 (1960).

323. *Id.* at 611; *cf.* *United States v. Worcester*, 190 F. Supp. 548 (D. Mass. 1960), where a federal district judge suspended a defendant's sentence on the condition that he would testify against his fellow wrongdoers and then subpoenaed one of those named by the defendant.

324. 316 F.2d 884 (7th Cir. 1963).

some other place than the trial and added that no error had been committed because the witness, and not the defendant, was deprived of his right to counsel.<sup>325</sup>

#### IV. FEDERAL INVESTIGATIVE BODIES

Most federal executive or administrative agencies with investigative subpoena powers can conduct their investigative proceedings either before a body or an individual official. These proceedings usually take place before an individual official; however, the investigative subpoenas of the Federal Petroleum Board and the Pacific Railway Commission were returnable to those agencies as bodies,<sup>326</sup> while the subpoenas of the National War Labor Board were returnable before a panel.<sup>327</sup> Under the Civil Rights Act of 1957, the Civil Rights Commission was required to hold its investigative hearings either before the Commission itself or, on its authorization, before a "subcommittee of two or more members, at least one of whom shall be of each major political party."<sup>328</sup> In this instance, the statute limited the role of counsel for subpoenaed witnesses to that of "advising them concerning their constitutional rights."<sup>329</sup> Moreover, the statute gave the chairman or acting chairman of an investigative hearing the power to censure and exclude counsel for "breaches of order and decorum and unprofessional ethics."<sup>330</sup> The statute further provided that a witness could obtain a transcript of his testimony at an executive session only when authorized by the Commission.<sup>331</sup>

It was this legislation that gave rise to *Hannah v. Larche*,<sup>332</sup> the case from which one of the dissenters in *Mead Corp.*<sup>333</sup> quoted at length. The Civil Rights Commission had subpoenaed some voting registrars and private citizens to a hearing at Shreveport, Louisiana. They sought to enjoin the Commission from holding its proposed hearing on the double ground that the Civil Rights Act of

325. *Id.* at 897.

326. See, e.g., *Kilgore Nat'l Bank v. Federal Petroleum Bd.*, 209 F.2d 557 (5th Cir. 1954); *Zinser v. Federal Petroleum Bd.*, 148 F.2d 993 (5th Cir. 1945); *Genecov v. Federal Petroleum Bd.*, 146 F.2d 596 (5th Cir. 1944), *cert. denied*, 324 U.S. 865 (1945); *Graham v. Federal Tender Bd.*, 118 F.2d 8 (5th Cir. 1941).

327. See, e.g., *S & W Cafeteria v. Aird*, 60 F. Supp. 599 (E.D. Tenn. 1945).

328. 71 Stat. 636, as amended, 42 U.S.C.A. § 1975d(f) (Supp. 1962).

329. 71 Stat. 634 (1957), 42 U.S.C. § 1975a(c) (1958).

330. 71 Stat. 634 (1957), 42 U.S.C. § 1975a(d) (1958).

331. 71 Stat. 635 (1957), 42 U.S.C. § 1975a(i) (1958).

332. 363 U.S. 420 (1960), *reversing* 177 F. Supp. 816 (W.D. La. 1959).

333. TRADE REG. REP. (1963 Trade Cas.) ¶ 16241, at 21067 (FTC Jan. 3, 1963).



1957 was unconstitutional and that the Commission's Rules of Procedure were invalid because they did not accord to those under investigation the rights of appraisal, confrontation, and cross-examination. A three-judge court held the act constitutional but the Rules invalid; the Supreme Court sustained both. In so doing, the Court approved the rules of the FTC and the SEC, which contained double restrictions on the right to counsel.

Once again administrative investigations were compared to grand jury investigations, although not as strongly as in some cases. Justices Black and Douglas objected to the comparison, but Mr. Chief Justice Warren, speaking for the Court, stated that the comparison was made "to show that the rules of this Commission are not alien to those which have historically governed the procedure of investigations conducted by agencies in the three major branches of our Government. . . ." <sup>334</sup>

In the three-judge court below, Circuit Judge Wisdom, although dissenting in part because he felt the Commission's Rules as well as the Act were both valid, nevertheless distinguished between a grand jury and the Commission, stating that

the creation of such a commission is of questionable legislative propriety, at best . . . The investigation of specific violations of the law is for grand juries, not legislative commissions. . . . When a subpoenaed

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334. 363 U.S. at 449. But Mr. Justice Douglas, in a dissenting opinion in which Mr. Justice Black concurred, pointed out the difference between a grand jury and the Commission:

The grand jury brings suspects before neighbors, not strangers. . . . This Commission has no such guarantee of fairness . . . . The members cannot be as independent as grand juries because they meet not for one occasion only; they do a continuing job for the executive and, if history is a guide, tend to acquire a vested interest in that role . . . . The Civil Rights Commission can hold all the hearings it desires; it can adduce testimony from as many people as it likes; it can search the records and archives for such information it needs to make an informed report to Congress . . . . But when it summons a person, accused under affidavit of having violated the federal election law, to see if the charge is true, it acts in lieu either of a grand jury or of a committing magistrate. The sifting of criminal charges against people is for the grand jury or for judges or magistrates and for them alone under our Constitution. In my view no other accusatory body can be used that withholds the rights of confrontation and cross-examination from those accused of federal crimes.

*Id.* at 498-99, 508. During oral argument before the Court, Mr. Justice Black emphasized the difference between a grand jury and the Commission: "Do you think it [an investigation by the Commission] is the same as the work of a grand jury made up of people living in the community? They sift out the charges to be preferred." Deputy Attorney General Lawrence E. Walsh pressed the grand jury analogy. Mr. Justice Black responded: "Again I suggest a difference between investigation by a grand jury composed of persons from the community and an investigation by this Commission." 28 U.S.L. WEEK 3222 (1960).

witness accused of a crime may be subjected to trial by exposure, a fact-finding determination and punishment, he should have the same rights of notice, confrontation, cross-examination, and all the other hard-earned rights embodied in due process that anyone accused of breaking the law is entitled to when he is tried before a judge. . . .<sup>335</sup>

In this case all eyes were focused on the rights of those under investigation to appraisal, confrontation, and cross-examination. The result may have been different had the subpoenaed witnesses attended the scheduled hearing and concentrated their objections at the proper time on the lack of full representation by counsel.

## V. MISCELLANEOUS FEDERAL INVESTIGATIVE AGENCIES

In addition to the more than two dozen executive and administrative agencies with investigative subpoena powers thus far considered, there are eleven more such agencies that deserve mention. They have not entered any court contests with subpoenaed witnesses, and most of them apparently have never published rules or regulations. In alphabetical order, they are: (1) Board of Investigation created by the Water Carrier Act to investigate various modes of transportation;<sup>336</sup> (2) Bureau of Corporations under a Commissioner of Corporations in the Department of Commerce and Labor;<sup>337</sup> (3) Commission on Industrial Relations;<sup>338</sup> (4) Commission on Intergovernmental Relations;<sup>339</sup> (5) Commission on Organization of the Executive Branch of the Government, known as the Hoover Commission;<sup>340</sup> (6) Commission to Investigate the Japanese Attack on Hawaii;<sup>341</sup> (7) Investigation Commission established by the Railroad Retirement Act of 1935;<sup>342</sup> (8) National Bituminous Coal Commission set up in the Interior Department by the Bituminous Coal Conservation Act of 1935;<sup>343</sup> (9) Railroad Labor Board created by the Transportation Act of 1920;<sup>344</sup> (10) Temporary National Economic Committee;<sup>345</sup> and (11) United States Coal Commission.<sup>346</sup>

The legislation for five of these agencies contained compulsory

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335. *Larche v. Hannah*, 177 F. Supp. 816, 831-32 (1959).

336. Act of Sept. 18, 1940, ch. 722, §§ 301-04, 54 Stat. 952.

337. Act of Feb. 14, 1903, ch. 552, § 6, 32 Stat. 827.

338. Act of Aug. 23, 1912, ch. 351, §§ 1-4, 37 Stat. 415.

339. Act of July 10, 1953, ch. 185, § 1-4, 67 Stat. 145.

340. Act of July 10, 1953, ch. 184, §§ 1-10, 67 Stat. 142.

341. H.R.J. Res. 259 of Dec. 23, 1941, ch. 620, 55 Stat. 853.

342. Act of Aug. 29, 1935, ch. 812, § 8, 49 Stat. 972.

343. Act of Aug. 30, 1935, ch. 824, § 2, 49 Stat. 992.

344. Act of Feb. 28, 1920, ch. 91, §§ 304-11, 41 Stat. 470-73.

345. S.J. Res. 300 of June 16, 1938, ch. 456, 52 Stat. 705.

346. Act of Sept. 22, 1922, ch. 415, 42 Stat. 1023.

testimony provisions as well as investigative subpoena powers. The Bureau of Corporations, the Railway Labor Board, and the United States Coal Commission had liberal immunity provisions, while the Commission to Investigate the Japanese Attack on Pearl Harbor and the Temporary National Economic Committee applied the strict immunity provisions first codified by the Securities Act of 1933. The statute establishing the United States Coal Commission made disobedience of one of its subpoenas or inspection orders an offense punishable "by a fine of not more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment."<sup>347</sup> Refusal to accede to an inspection order of the Railroad Labor Board is an offense punishable by a penalty of 500 dollars and "each day during any part of which such offense continues shall constitute a separate offense."<sup>348</sup> The Commission on Intergovernmental Relations and the Hoover Commission had available to them the procedures and penalties for violation of a congressional subpoena.<sup>349</sup> The penalties were "a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."<sup>350</sup>

These eleven agencies bring to more than three dozen the number of executive and administrative agencies that had investigative subpoena powers, to which number can be added the President to complete the list. The majority of these agencies are currently in existence and in the exercise of these powers.

## VI. SUMMARY OF SIMILARITIES AND DIFFERENCES

Administrative investigations developed patterns of their own with numerous differences and variations among the different agencies. These similarities and contrasting differences will be presented in lettered paragraphs, using the procedures of the CAB as a basic pattern.

a. Administrative investigations are usually conducted by and before a single official. Agencies such as the Pacific Railway Commission, the Federal Petroleum Board, and the National War Labor Board, however, often, and even usually, conducted their investigative hearings before bodies; and, in the instance of the Civil Rights Commission, the relevant statute required hearings before a body.

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347. Act of Sept. 22, 1922, ch. 412, 42 Stat. 1025.

348. Act of Feb. 28, 1920, ch. 91, § 311(a), 41 Stat. 472.

349. Act of July 10, 1953, ch. 185, § 4(a), 67 Stat. 146; Act of July 10, 1953, ch. 184, § 10(a), 67 Stat. 144.

350. 52 Stat. 942 (1938), 2 U.S.C. § 192 (1958).

b. Subpoena powers in the head or heads of an administrative or executive agency are usually delegable and delegated. But in *Cudahy Packing Co. v. Holland*,<sup>351</sup> involving the Administrator of the Wage and Hour Division of the Labor Department, the Court held that under the Fair Labor Standards Act of 1938, which made applicable the subpoena provisions of the Federal Trade Commission Act, the Administrator was not authorized to delegate his subpoena powers. This result, however, was reversed by Reorganization Plan No. 6 of 1950,<sup>352</sup> which gave the power of such delegation to the Secretary of Labor, and Reorganization Plan No. 8 of 1950,<sup>353</sup> which gave a like power of delegation to the chairman of the FTC. Also, there was some change in the Court's approach in the later case of *Fleming v. Mohawk Wrecking & Lumber Co.*,<sup>354</sup> where the Court held that the Price Administrator could delegate his subpoena powers.

c. Subpoenas usually run from any place in the United States to any place in the United States.<sup>355</sup> Here there are at least a half dozen variations, some broader and some more restricted. The broadest applies to the Commission to Investigate the Japanese Attack of Hawaii; its subpoenas ran to "any place subject to the civil or military jurisdiction of the United States."<sup>356</sup> There are four variations applicable to the SEC. Under the Investment Advisers Act of 1940, the Investment Company Act of 1940, and the Public Utility Holding Company Act of 1935, subpoenas run to "any place in any State or in any Territory or other place subject to the jurisdiction of the United States";<sup>357</sup> under the Trust Indenture Act of 1939, to "any place in the United States or in any Territory";<sup>358</sup> under the Securities Exchange Act of 1934, to "any place in the United States or any State";<sup>359</sup> and under the Securities Act of 1933, to "any place in the United States or any Territory."<sup>360</sup> The subpoenas of the NLRB run to "any place in the United States or any Territory or possession thereof."<sup>361</sup> On

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351. 315 U.S. 357 (1942).

352. 64 Stat. 1263, 1264.

353. 64 Stat. 1264.

354. 331 U.S. 111 (1947).

355. Cf. FED. R. CRIM. P. 17(e)(1): "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States."

356. H.R.J. Res. of Dec. 23, 1941, ch. 620, § (a), 55 Stat. 854.

357. 54 Stat. 853 (1940), 15 U.S.C. § 80b-9(b) (1958); 54 Stat. 842 (1940), 15 U.S.C. § 80a-41(b) (1958); 49 Stat. 831 (1935), 15 U.S.C. § 79r(c) (1958).

358. 53 Stat. 1174, 15 U.S.C. § 77uuu(a) (1958).

359. 48 Stat. 899, 15 U.S.C. § 78u(b) (1958).

360. 48 Stat. 86, 15 U.S.C. § 77s(b) (1958).

361. 49 Stat. 455 (1935), 29 U.S.C. § 161(f) (1958).

the other hand, the subpoenas of the Administrator of the VA are limited to within 100 miles from the place of hearing;<sup>362</sup> those of the Secretary of Labor under the United States Employees' Compensation Act, to "within a radius of one hundred miles";<sup>363</sup> those of the same official under the Longshoremen's and Harbor Workers' Compensation Act to within the state of the residence of the witness "and not more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day's attendance shall first be paid or tendered to him";<sup>364</sup> and those of the Civil Rights Commission to the state "wherein the witness is found or resides or transacts business."<sup>365</sup>

d. Fees and mileage paid witnesses in administrative investigations are almost always the same as those that are paid witnesses in the courts of the United States.<sup>366</sup> The Civil Rights Act of 1957, however, added a provision allowing witnesses who are "so far removed from their respective residences as to prohibit return thereto from day to day . . . an additional allowance of \$12 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance."<sup>367</sup> The Coast Guard pays up to the amount received by district court witnesses.<sup>368</sup>

e. The usual manner of compelling obedience to an administrative subpoena is by a court enforcement order, disobedience of which constitutes contempt of court. Indeed, in *ICC v. Brimson*<sup>369</sup> the Court indicated that this was the only way to enforce administrative subpoenas. Nevertheless, there are numerous variations from the usual pattern. The earliest legislation for administrative subpoena powers, that relating to taxes in 1864, authorized

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362. 72 Stat. 1237 (1958), 38 U.S.C. § 3311 (1958); *cf.* FED. R. CIV. P. 45(e): "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena. . . ."

363. 39 Stat. 748 (1916), 5 U.S.C. § 780 (1958).

364. 44 Stat. 1437 (1927), 33 U.S.C. § 924 (1958).

365. 71 Stat. 634 (1957), 42 U.S.C. § 1975a(h) (1958).

366. Under 70 Stat. 798 (1956), 28 U.S.C. § 1821 (1958), the basic rate for such witnesses is four dollars a day and eight cents per mile, plus this provision:

Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of \$8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance . . . .

367. 71 Stat. 635, 42 U.S.C. § 1975a(j) (1958).

368. 49 Stat. 1383 (1936), as amended, 46 U.S.C. § 239(f) (1958).

369. 154 U.S. 447 (1894).

assessors to apply for an attachment against a subpoenaed person as for a contempt. The second act, that relating to the officers and crews of vessels in 1871, authorized local boards of inspectors to compel the attendance of subpoenaed witnesses by a process similar to that in the federal courts. The Compulsory Testimony Act of 1893, passed as an amendment to the Interstate Commerce Act, made disobedience of the ICC's subpoenas an offense punishable by a "fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."<sup>370</sup> The Communications Act of 1934 provided for the same penalty,<sup>371</sup> and similar provisions have become rather frequent. The Federal Trade Commission Act raised the minimum of the fine from 100 to 1000 dollars. The Federal Power Act, the Natural Gas Act, and the Internal Revenue Code of 1954 provide for a maximum fine of 1000 dollars or a year's imprisonment or both; the Internal Revenue Code of 1954 also adds the costs of prosecution. One who denies the FTC access to records is subject to a fine of not less than 1,000 dollars nor more than 5,000 dollars, or imprisonment up to three years or both. The Commission on Intergovernmental Relations and the Hoover Commission could seek to have the penalties for violation of a congressional subpoena imposed.

f. The variations extend even to the way to apply for court enforcement of an administrative subpoena. Rule 81(a)(3) of the Federal Rules of Civil Procedure provides, in part:

These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

In *Martin v. Chandis Securities Co.*,<sup>372</sup> involving a subpoena of the Internal Revenue Service, the Court of Appeals for the Ninth Circuit held the Rules to be applicable. But in *United States v. Vivian*,<sup>373</sup> involving a subpoena of the Immigration and Naturalization Service, the Court of Appeals for the Seventh Circuit ruled otherwise, holding service of process unnecessary because "pyramiding summonses on subpoenas serves no useful purpose."<sup>374</sup> To the extent that the question has arisen, the courts have usually

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370. 27 Stat. 443 (1893), 49 U.S.C. § 46 (1958).

371. 48 Stat. 1096 (1934), 47 U.S.C. § 409(m) (1958).

372. 128 F.2d 731 (9th Cir. 1942).

373. 224 F.2d 53 (7th Cir. 1955), *cert. denied*, 350 U.S. 953 (1956).

374. *Id.* at 57.

been inclined to the simpler procedure followed in the *Vivian* case.<sup>375</sup>

g. Court enforcement orders of administrative subpoenas have usually been held to be final and appealable. This contrasts with court orders enforcing court subpoenas, which are not final and appealable under *Cobbledick v. United States*.<sup>376</sup> But, under section 7604(b) of the Internal Revenue Code of 1954 and its predecessors, which permitted application for an attachment against a subpoenaed person as for a contempt, the courts divided on the appealability of court enforcement orders. The question reached the Supreme Court in *Davis v. Soja*,<sup>377</sup> but the case was disposed of on a joint suggestion of mootness.

h. Disobedience of a court enforcement order of an administrative subpoena has usually been held to constitute a civil contempt. Nevertheless, the First Circuit in *Brody v. United States*<sup>378</sup> called such disobedience a criminal contempt.

i. Disobedience of an administrative subpoena has not been regarded as a contempt at all. However, the second circuit, in *Application of Colton*,<sup>379</sup> indicated that under section 7604(b) of the Internal Revenue Code of 1954 such disobedience might constitute a contempt.

j. On the rights of subpoenaed persons to counsel in administrative investigative proceedings, there is such a variance that it is impossible to state any general practice. Despite the requirement of section 6(a) of the Administrative Procedure Act that subpoenaed persons "be accorded the right to be accompanied, represented, and advised by counsel," administrative agencies have been slow to comply. Statutes such as the Export Control Act of 1949 and the Second Decontrol Act of 1947 exempt certain agencies from various sections, including section 6, of the Administrative Procedure Act. In the case of the Civil Rights Commission, the

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375. See, e.g., *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450 (6th Cir. 1941); *Cudahy Packing Co. v. NLRB*, 117 F.2d 692 (10th Cir. 1941). A note of the Advisory Committee on Rules to FED. R. CIV. P. 45 states in part:

It [Rule 45] does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States . . . .  
376. 309 U.S. 323 (1940).

377. 31 U.S.L. WEEK 3415 (June 17, 1963), *vacating judgment in Application of Davis*, 303 F.2d 601 (7th Cir. 1962).

378. 243 F.2d 378 (1st Cir.), *cert. denied*, 354 U.S. 923 (1957).

379. 291 F.2d 487, 489 (2d Cir. 1961).

applicable statute itself limited the role of counsel for subpoenaed witnesses. Some executive and administrative agencies<sup>380</sup> still make no provision for counsel for subpoenaed witnesses in investigative hearings. The AEC in its regulations simply provides that the procedure is to "be such as will best serve the purpose of the hearing." The FCC has a comparable provision; the procedures to be followed are to "be such as in the opinion of the Commission will best serve the purposes of such proceeding." Some agencies, such as the CAB, the Federal Maritime Commission, the Internal Revenue Service, and the SEC still limit counsel for subpoenaed witnesses to ear-whispering. It was this restrictive practice that the FTC ameliorated in January, 1963 in *Mead Corp.*<sup>381</sup> The CAB, the Internal Revenue Service, and the SEC also limit subpoenaed witnesses in their choice of counsel. Only one agency, the Federal Power Commission, goes beyond the requirements of section 6(a) of the Administrative Procedure Act; its regulations accord the right of representation by counsel to voluntary as well as subpoenaed witnesses.

k. Beginning with the Securities Act of 1933, many statutes have supplied executive and administrative agencies with compulsory testimony provisions under which a subpoenaed individual first has to claim his privilege against self-incrimination to obtain immunity from prosecution. But some agencies, such as the Commodity Exchange Commission, the FTC,<sup>382</sup> and the ICC, still have the older form under which a subpoenaed individual obtains immunity without claiming his privilege. The Federal Maritime Commission administers two acts, one of which has the newer type of compulsory testimony provision and the other the older. The Coast Guard, the Federal Home Loan Bank Board, the Immigration and Naturalization Service, the Internal Revenue Service, the United States Tariff Commission, and the VA have no compulsory testimony provision. The Agriculture Department administers six acts, four contain the older form of compulsory testimony provision, and two contain no compulsory testimony provision at all. The Labor Department and the NLRB administer seven acts, three contain the older form of compulsory testimony provision, another contains the newer form, and three contain no compulsory testimony provision at all.

1. Section 6(b) of the Administrative Procedure Act provides that a subpoenaed person, instead of obtaining a copy of his testi-

380. *E.g.*, the Agriculture Department, the Coast Guard, the Federal Aviation Agency, the Labor Department, the NLRB, and the VA.

381. TRADE REG. REP. (1963 Trade Cas.) ¶ 16241 (FTC Jan. 3, 1963).

382. 38 Stat. 723 (1914), 15 U.S.C. § 49 (1958).



mony, "may for good cause be limited to inspection of the official transcript of his testimony." This has become a general provision. In administering the Export Control Act of 1949, however, the Commerce Department has provided without qualification that witnesses are entitled to copies of transcripts of their own testimony.

Yet in all this maze, at least one thing seems certain—if a subpoenaed person wants to be fully represented by counsel, he should be entitled to such representation.

## VII. FEDERAL INQUISITIONAL TREND

There is no doubt that the federal grand jury has a permanence that the beginning provision of the fifth amendment protects: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." <sup>383</sup> Moreover, the Supreme Court has always supported the grand jury in words of ringing praise. In a recent case, *Wood v. Georgia*, <sup>384</sup> involving a conviction for contempt of court of a Georgia sheriff for out-of-court statements questioning the advisability of a grand jury investigation into block voting by Negroes, the Court, in reversing the conviction, referred to the grand jury as a

primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will . . . . <sup>385</sup>

Two terms earlier, in *Stirone v. United States*, <sup>386</sup> the Court reversed a conviction because it was based on evidence not within the grand jury's charge. A few years before that, in *Costello v. United States*, <sup>387</sup> the Court held that a grand jury could base an indictment solely on hearsay testimony, stating that "in this country . . . the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor . . . ." <sup>388</sup> Furthermore, the Supreme Court's estimate of

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383. U.S. CONST. amend. V.

384. 370 U.S. 375 (1962).

385. *Id.* at 390.

386. 361 U.S. 212 (1960). In *Russell v. United States*, 369 U.S. 749 (1962), the Court reversed convictions in six cases for contempt of Congress because the indictments did not aver the subject under congressional committee inquiry.

387. 350 U.S. 359 (1956).

388. *Id.* at 362. In the leading case of *Ex parte Bain*, 121 U.S. 1 (1887),

the grand jury is historically correct. This body was essential to the development of our accusatorial method in the treatment of deviants. Alexis de Tocqueville, in *Democracy in America*, correctly saw trial by jury as raising the people "to the bench of judges" and investing them "with the direction of society."<sup>389</sup>

Nevertheless, the federal trend, and the modern trend generally, is in the direction of inquisitions by officials. Some sixty federal acts, half of them passed in the decade which began with the year 1933, have given investigative subpoena powers to executive and administrative officials. The grand jury is looked upon with growing disfavor. It is regarded as too cumbersome for our increasingly complex and more administratively managed society. It has been thought of as a rubber stamp for the prosecutor, yet it has been critically referred to for just the opposite reason by the Civil Rights Commission.<sup>390</sup>

In addition to the modern inquisitional trend, such decisions as *Shapiro v. United States*,<sup>391</sup> where the Supreme Court set up its required records exception to the fifth amendment's right

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the Court, in holding that the charges in an indictment could not be broadened by amendment, quoted from a charge to a grand jury by Mr. Justice Field, which stated in part:

In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country . . . and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government, or be prompted by partisan passion or private enmity. No person shall be required according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for this accusation and trial.

*Id.* at 11.

389. 1 DE TOQUEVILLE, *DEMOCRACY IN AMERICA*, 282-83 (Reeve text as rev. by Bowen, Bradley ed. 1945).

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13. Since [18 U.S.C.] Section 242, the principal criminal Federal civil rights act, defines only a misdemeanor, prosecution can be instituted by information (a sworn statement setting out the specific charges against the defendant) as well as by grand jury indictment. The former method avoids the delay and the hazard of one more hostile jury, involved in a presentment to a grand jury, and allows the facts to be brought to the attention of the affected community in a public trial. An information has been used by the Department of Justice only once and then successfully.

1961 CIVIL RIGHTS COMMISSION, REPORT ON JUSTICE 110-11.

391. 335 U.S. 1 (1948).

of silence; *Brown v. Walker*,<sup>392</sup> *Brown v. United States*,<sup>393</sup> and other decisions, in which the Court sustained the validity of compulsory testimony acts; *Rogers v. United States*,<sup>394</sup> where the Court announced its waiver doctrine of one's right of silence; *Marcello v. Bonds*,<sup>395</sup> where the Court held that a special inquiry officer of the Immigration and Naturalization Service could take the dual role of prosecutor and judge; *Levine v. United States*,<sup>396</sup> where the Court permitted a federal district judge to clear the court room and question a grand jury witness; *Goldberg v. Battles*,<sup>397</sup> where the Court of Appeals for the Third Circuit sanctioned the delegation of the conduct of an investigational hearing under the Labor-Management Reporting and Disclosure Act of 1959 to an employee of the Department of Justice; and *United States v. Standard Oil Co.*,<sup>398</sup> where the Court of Appeals for the Seventh Circuit condoned the conduct of a prosecutor in subpoenaing witnesses to his office and questioning them in private, indicate that to a certain extent the accusatorial method developed by English-speaking peoples has been replaced by the inquisitorial system developed, and in recent decades exploited, on the mainland of Europe.

*(Parts II and III of this Article will be published in Volume 48.)*

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392. 161 U.S. 591 (1896).

393. 359 U.S. 41 (1959).

394. 340 U.S. 367 (1951).

395. 349 U.S. 302 (1955).

396. 362 U.S. 610 (1960).

397. 196 F. Supp. 749 (E.D. Pa. 1961), *aff'd per curiam*, 299 F.2d 937 (3d Cir.), *cert. denied*, 371 U.S. 717 (1962).

398. 316 F.2d 884 (7th Cir. 1963).